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No. 14410

United States
Court of Appeals
for the Ninth Circuit

ERWIN P. WERNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

AUG 31 1954

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;
JOSEPH F. McPHERSON,
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Los Angeles 12, Calif.

United States District Court for the Southern
District of California, Central Division

No. 13302-M

ERWIN P. WERNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FIRST AMENDED COMPLAINT FOR MONEY
AND FOR USE AND OCCUPATION OF
LAND AND FOR DECLARATORY RELIEF

Comes Now the plaintiff and for cause of action
against the defendant complains and alleges as
follows:

I.

That at all times herein mentioned, plaintiff has
been, and now is, a resident of the County of Los
Angeles, State of California, and at all times has
been, and now is, a citizen of the United States of
America.

II.

That the United States District Court has juris-
diction over this litigation by reason of the fact
that the defendant is the United States of America
and the plaintiff is a citizen of said country.

III.

That on or about the 17th day of May, 1948, the
plaintiff [2*] herein became and was the owner in

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

fee, and therefore entitled to the full enjoyment and possession of the following real property, situated in the County of Riverside, in the State of California, and more particularly described as follows:

The southeast (SE) one-quarter ($\frac{1}{4}$) of the southeast (SE) one-quarter ($\frac{1}{4}$) of Section Sixteen (16), Township Three (3) South, Range Four (4) West, S. B. B. & M., containing forty (40) acres more or less.

IV.

That on or about February 1, 1943, the plaintiff's predecessor in interest and the defendant, the United States of America, executed a lease of the above-described real property; a typewritten copy of said lease is hereto annexed, made a part hereof, and marked "Exhibit A."

That on or about May 31, 1943, the plaintiff's predecessor in interest and the defendant, the United States of America, executed a supplemental agreement to dispense with notice of renewal of the above-described real property; a typewritten copy of said supplemental agreement is hereto annexed, made a part hereof, and marked "Exhibit B."

V.

That by the terms and provisions of the lease and the supplemental agreement, the termination thereof was expressed as follows: "* * *; and provided further that this lease shall in no event extend beyond six months from the date of the termination

of the unlimited national emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487)."

That a copy of said Proclamation 2487 is hereto annexed, made a part hereof and marked "Exhibit C."

VI.

That the "Unlimited National Emergency" confronting the [3] United States as proclaimed by the President of the United States was based upon a threat to the security of the United States by "the Axis belligerents."

That at the time of the execution of said lease and supplemental agreement, the United States was at war with "the Axis belligerents"; that the said "Axis belligerents" consisted of the Imperial Government of Japan, Italy, Germany and Austria; that at that time the allied nations consisted of the United States of America, the Imperial Government of Great Britain, the Republic of France, and the Soviet Republic of Russia.

VII.

That on December 31, 1946, the President of the United States issued a Proclamation No. 2714, a copy of which is hereto annexed, made a part hereof and marked "Exhibit D"; that in said Proclamation appears the following language:

"Now Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World

War II, effective twelve o'clock noon, December 31, 1946."

That prior to December 31, 1946, all of the Axis belligerents that were engaged in a war with the allied nations had unconditionally surrendered.

VIII.

That on December 16, 1950, the President of the United States proclaimed the existence of a National Emergency by Proclamation 2914, a photostatic copy of which is hereto annexed and made a part hereof and marked "Exhibit E." That by this Proclamation the President of the United States recognized a new threat to the peace and security of the United States; that he declared recent events constituted a grave threat to the peace of this country; that the world conquest by Communist Imperialism is the goal of [4] aggression that have been loosed upon the world and that the increasing menace of the forces of Communist aggression requires that the national defense of the United States be strengthened as speedily as possible.

IX.

That the plaintiff contends that the "Unlimited National Emergency," as proclaimed by the President of the United States in Proclamation 2487, "Exhibit C," is and has been terminated by reason of the following facts, or by a combination of one or more of the following facts as set forth, or by any additional facts which may arise prior to the

time that this Court makes its decision and of which this Court is compelled to take judicial notice:

1. That the Unlimited Emergency, as proclaimed by the President of the United States May 27, 1941, Proclamation 2487, "Exhibit C," was merged and therefore terminated, between December 31, 1946, and December 16, 1950, by reason of world conquest by Communistic Imperialism as evidenced by the events in Korea and elsewhere, which constitutes a threat to the peace of the world, and to the United States of America, and which culminated in the official proclamation of December 16, 1950, Proclamation 2914, "Exhibit E," by President Truman.

2. That on September 8, 1943, the Imperial Government of Italy signed the Articles of Surrender.

3. That on February 10, 1947, a Treaty of Peace was signed at Paris between the Government of Italy and the Government of the United States (this same Treaty was executed by the other belligerents) and was ratified September 15, 1947, by the United States Senate (State Document No. 2960). The Treaty of Friendship, Commerce and Navigation between Italy and the United States was ratified by the United States July 26, 1949.

4. No reason exists to consider Italy a threat to the security of the United States within the meaning of the Presidential [5] Proclamation of May 27, 1941; that on May 6, 1945, at 8:41 o'clock p.m., the Government of Austria signed the Articles of Surrender.

5. That in the Moscow Declaration of November 1, 1943, the United States, Great Britain and the

Soviet Union proclaimed that Austria was a victim of Hitlerite aggression and that the annexation of Austria on March 15, 1938, was null and void, as per letter of Department of State of August 6, 1951, annexed hereto and made a part hereof and marked "Exhibit F"; that therefore a state of war does not exist between Austria and the United States, and that therefore "no reason exists to consider Austria a threat to the security of the United States within the meaning of the Presidential Proclamation of May 27, 1941." (See Exhibit F.)

That on April 27, 1945, Austria was restored to a Republic of eight provinces under the leadership of Dr. Karl Renner, and this democratic Republic was accepted by the Allied Council representing the Allied Powers, and so recognized on October 20, 1945.

6. That on May 7, 1945, at 2:41 o'clock a.m., the Government of Germany signed the Articles of Surrender.

That on July 27, 1951, the House of Representatives unanimously voted to end the state of war, against Germany, at the request of the President of the United States, and that subsequently thereto, on the day of,, the Senate of the United States voted to end the state of war with Germany, and that on the day of,, the President of the United States signed the legislation to end the state of war with Germany; that the plaintiff asks leave to insert

the day, month and year when and the same are ascertained.

That since the merger of the unlimited emergency as declared by the President of the United States in 1941, and the merger therewith, with the emergency as declared by the President of the United States on December, 1950, there no longer exists a threat to the security of the United States as contemplated by the unlimited emergency of 1941, as proclaimed by and within the meaning of the [6] Presidential Proclamation (see Exhibit C).

7. That on September 1, 1945, the Imperial Government of Japan signed the Articles of Surrender. Therefore, no reason exists to consider Japan a threat to the security of the United States within the meaning of the Presidential Proclamation of May, 1941.

Plaintiff is informed and believes the truth to be, and therefore alleges, that the terms of a tentative Treaty of Peace has been agreed upon by the representatives of the Government of Japan and the defendant, the United States of America; that September 4, 1951, has been set as the date for the formal signing of said Treaty of Peace. Said Treaty of Peace with Japan was signed on the 8th day of September, 1951, with the United States of America; that on or about the day of, the Treaty of Peace was ratified by the Senate of the United States; the plaintiff hereby asks leave to insert the correct date as soon as the same are ascertained.

The plaintiff alleges, as the owner of the afore-

said real property in fee simple, that he is deprived of the possession thereof, and for the use and enjoyment and the benefits that inure to him by virtue of the Lease and the Supplemental Agreement on such real estate; that the said Lease and Supplemental Agreement were entered into by the Lessor on a patriotic basis at a time when the defendant, the United States of America, was actually engaged in war, and the payment of rental thereof at the rate of \$25.00 per year constituted, primarily, only a token payment; that the real estate leased constituted forty (40) acres of land of the reasonable value of \$40,000; that since May 17, 1948, at which time plaintiff became the owner in fee, the defendant, the United States of America, has paid him no money or monies for use and occupation of said real estate; that the said Lease and Supplemental Agreement constitutes a cloud upon the title of the said real estate and deprives the plaintiff [7] from possession thereof, and from the enjoyment of its use and occupation; that the said plaintiff is unable to sell said real property and/or hypothecate the same for the purposes of a real estate loan; that defendant is and at all times herein mentioned has been and is in possession of said real property against the will and consent of the plaintiff.

X. .

Plaintiff alleges that by the terms and conditions of the said Lease for the said real property aforesaid, and by the terms and conditions of the Supplemental Agreement, providing that the said Lease

shall in no event extend beyond six months from the date of the termination of the unlimited National Emergency as declared by the President of the United States on May 27, 1941 (Proclamation 2487), the said lease has been terminated; that the unlimited National Emergency, as per Proclamation 2487, has ceased to exist; that there no longer exists a threat to the security of the United States of America as was contemplated by the Proclamation 2487; that various Treaties of Peace between the defendant, the United States of America, and the former belligerent nations have been executed, agreed upon and are in process of consummation; that various treaties of friendship, trade and commerce between the defendant, the United States of America, and the former belligerent nations have been executed, agreed upon and are in process of consummation; that the Treasury Department of the United States of America, by its regulation of its commerce and the fixing of the rates of exchange of the former belligerent nations, and that the said State Department in establishing its diplomatic service among former belligerent nations, or some of them, and by reason of the unconditional surrender of all of the former belligerents the unlimited National Emergency, as proclaimed by President Roosevelt May 27, 1941, has become and is terminated, and have dissolved forever the Axis belligerents as they existed as a threat at the time of the signing on the lease herein mentioned. [8]

XI.

Plaintiff prays that in addition to the reasons

specifically set forth in the complaint that the Court consider all other matters of which it is compelled to take judicial notice.

XII.

Plaintiff prays leave of Court to amend the complaint to conform to all those events and progress which may affect the consideration of this cause.

Second Cause of Action

I.

Plaintiff incorporates paragraphs I to XII, inclusive, of the First Cause of Action and makes them a part of this, his Second Cause of Action, the same as though separately set forth herein.

II.

That the lease herein and the supplemental agreement was terminated between May 7, 1948, and December 6, 1950, for the reasons stated in Paragraph 8 of the First Cause of Action; that ever since said date of termination of lease and the supplemental agreement the defendant has been and now is in actual possession, use and enjoyment of the said real property against the will of the plaintiff and against his consent, and in violation of the termination of said lease and supplemental agreement. Plaintiff further alleges that the fair market value of said land is \$40,000.00.

III.

That the reasonable value for use and occupation of said real property, since the termination of said

lease and supplemental agreement to date of filing of the complaint is the reasonable sum of [9] \$10,000.00.

Wherefore, plaintiff prays that the Court declare and adjudge:

1. The rights of the parties relative to the lease of the real estate herein involved.

2. That the lease of the real estate herein involved is terminated as of the day of,

3. That the Unlimited National Emergency, as defined in the Proclamation of the President of the United States (Proclamation 2487) declared on May 27, 1941, has been terminated by reason of the facts alleged and set forth in the complaint as of the day of,

4. That the plaintiff have judgment against the defendant, The United States of America, as compensation for loss of use and occupation of the real estate.

5. And for such other relief as the Court deems fit and proper.

/s/ CLARENCE E. NELSON,
Attorney for Plaintiff. [10]

EXHIBIT A

Lease Between

Mark L. Herron and Barbara W. Herron and
The United States of America

1. This Lease, made and entered into this first day of February in the year one thousand nine

hundred and forty-three by and between Mark L. Herron and Barbara W. Herron, husband and wife, whose address is 1025 Chapman Building, Los Angeles, California, for themselves, their heirs, executors, administrators, successors and assigns, hereinafter called the Lessor, and 'The United States of America, hereinafter call the Government.

Witnesseth: The parties hereto for the consideration hereinafter mentioned covenant and agree as follows:

2. The Lessor hereby leases to the Government the following described premises, viz.:

All of that certain parcel of land in the Alessandro District, County of Riverside, State of California, described as:

The Southeast quarter (SE $\frac{1}{4}$) of the Southeast quarter (SE $\frac{1}{4}$) of Section 16, Township 3 South, Range 4 West S. B. B. & M., containing 40 acres, more or less, to be used exclusively for the following purposes (See instruction No. 3):

Military purposes.

3. To Have and to Hold the said premises with their appurtenances for the term beginning February 1, 1943, and ending June 30, 1943.

4. The Government shall not assign this lease in any event, and shall not sublet the demised premises except to a desirable tenant and for a similar purpose, and will not permit the use of said premises by any one other than the Government, such sublessee, and [11] the agents and servants of the Government, or of such sublessee.

5. This lease may, at the option of the Govern-

ment, be renewed from year to year at a rental of twenty-five and no/100 Dollars (\$25.00) per year, and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least thirty (30) days before this lease or any renewal thereof would otherwise expire: Provided that no renewal thereof shall extend the period of occupancy of the premises beyond six (6) months from the date of the termination of the unlimited National Emergency, as declared by the President of the United States on May 27, 1941. (Proclamation 2487)

6. The Lessor shall furnish to the Government during the occupancy of said premises, under the terms of this lease, as part of the rental consideration, the following:

Nothing.

7. The Government shall pay the Lessor for the premises at the following rate:

Twenty-five and no/100 Dollars (\$25.00) per year, or pro rata amount for fractional period of use thereof.

Finance officer, U. S. Army, Fort Douglas, Utah, is designated to pay this rental.

Payments shall be made at the end of each fiscal year.

8. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures and erect additions, structures or signs, in or upon the premises hereby leased (Provided

such alterations, additions, structures or signs shall not be detrimental to or inconsistent with the rights granted to other tenants on the property or in the building in which said premises are located); which fixtures, additions or structures so placed in or upon or attached to the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, and the Government, if required by [12] the Lessor shall, before the expiration of this lease or renewal thereof, restore the premises to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control excepted: Provided, however, that if the Lessor requires such restoration, the Lessor shall give written notice thereof to the Government twenty (20) days before the termination of the lease.

(Paragraphs 9 and 10 deleted.)

11. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefit to arise therefrom. Nothing, however herein contained shall be construed to extend to any incorporated company, if the lease be for the general benefit of such corporation or company.

12. The Government reserves the right to cancel this lease at any time during its life or renewal

thereof by giving thirty (30) days advance written notice to the Lessor.

13. The condition of the demised premises is outlined in a Joint Record of Physical Survey which is appended hereto and made a part hereof.

Paragraphs 9 and 10 deleted, and Paragraphs 12 and 13 added.

In Witness Whereof, the parties hereto have hereunto subscribed their names as of the date first above written.

/s/ MARK L. HERRON,

/s/ BARBARA W. HERRON,

Husband and wife, Lessor.

UNITED STATES
OF AMERICA,

By /s/ THOMAS F. OREGHAN,

Chief Los Angeles Sub-office
Contracting officer.

In Presence of:

/s/ INEZ M. KEMPER,

2020 Beachwood Dr.,
Hollywood, Calif.

Certified true copy.

/s/ GEORGE T. WIGMORE. [13]

Instructions to Be Observed in Executing Lease

1. This standard form of lease shall be used whenever the Government is the lessee of real prop-

erty except that when the total consideration does not exceed \$100.00 and the term of the lease does not exceed 1 year the use of this form is optional. In all cases where the rental to be paid exceeds \$2,000.00 per annum the annual rental shall not exceed 15 per centum of the fair market value of the rented premises at the date of lease. Alterations, improvements and repairs of the rented premises by the Government shall not exceed 25 per centum of the amount of the rent for the first year of the rental term or for the rental term if less than 1 year.

2. The lease shall be dated and the full name and address of the lessor clearly written in paragraph 1.

3. The premises shall be fully described and, in case of rooms, the floor and room number of each room given. The language inserted at the end of Article 2 of the lease should specify only the general nature of the use, that is, "office quarters," "storage space, etc."

4. Whenever the lease is executed by an attorney, agent, or trustee on behalf of the lessor, two authenticated copies of his power of attorney, or other evidence to act on behalf of the lessor shall accompany the lease.

5. When the lessor is a partnership, the names of the partners composing the firm shall be stated in the body of the lease. The lease shall be signed with the partnership name, followed by the name of the partner signing the same.

6. Where the lessor is a corporation, the lease shall be signed with the corporate name, followed by the signature and title of the officer or other person signing the lease in its behalf, duly attested, and, if requested by the Government, evidence of his authority so to act shall be furnished.

7. Under paragraph 6 of the lease insert necessary facilities to be furnished, such as head, light, janitor service, etc. [14]

8. There shall be no deviation from this form without prior authorization by the Director of Procurement, except—

(a) Paragraph 3 may be drafted to cover a monthly tenancy or other period less than a year.

(b) In paragraph 5 if a renewal for a specified period other than a year, or for a period optional with the Government is desired, the phrase, “from year to year” shall be deleted and proper substitution made. If the right of renewal is not desired or cannot be secured paragraph 5 may be deleted.

(c) Paragraph 6 may be deleted if the owner is not to furnish additional facilities.

(d) If the premises are suitable without alterations, etc., paragraph 8 may be deleted.

(e) Paragraph 9 provides that the lessor shall, “unless herein specified to the contrary, maintain the said premises in good repair, etc.” A modification or elimination of this requirement would not therefore be a deviation.

(f) In case the premises consist of unimproved land, paragraph 10 may be deleted.

(g) When executing leases covering premises in foreign countries departure from the standard form is permissible to the extent necessary to conform to local laws, customs or practices.

(h) Additional provisions, relating to the particular subject matter mutually agreed upon may be inserted, if not in conflict with the standard provisions, including a mutual right to terminate the lease upon a stated number of days' notice, but to permit only the lessor so to terminate would be a deviation requiring approval as above provided.

9. When deletions or other alterations are permitted specific notation thereof shall be entered in the blank space following paragraph 11 before signing.

10. If the property leased is located in a State requiring the recording of leases in order to protect the tenant's rights, care should be taken to comply with all such statutory requirements. [15]

EXHIBIT B

Supplemental Agreement to Dispense With Notice of Renewal

This Supplemental Agreement entered into this 31st day of May, 1943, by and between Mark L. Herron and Barbara F. Herron, husband and wife, whose address is 1025 Chapman Building, Los Angeles, California, for themselves, their heirs, executors, administrators, successors, and assigns, hereinafter called the Lessor, and The United

States of America, hereinafter called the Government, Witnesseth:

Whereas on Feb. 1, 1943, a lease was entered into between the Lessor and the Government covering all of the Southeast Quarter (SE $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 16, Township 3, South, Range 4 West, S. B. B. & M., containing 40 acres, more or less, being located in the Alessandro District of the County of Riverside, State of California, for the period February 1, 1943, to June 30, 1943, with option of renewal annually thereafter to six months from the date of the termination of the unlimited National Emergency, as declared by the President of the United States on May 27, 1941, (Presidential Proclamation 2487).

Whereas it is desired to amend said lease to dispense with the services of notice of renewal for each fiscal year, as hereinafter provided;

Now, Therefore, the parties hereto do hereby amend said lease in the following respects and in these only:

1. Provisions 3 and 5 are deleted, and there is inserted in lieu thereof the following provision numbered 3:

“3. To Have and to Hold the Said Premises with their appurtenances for the term beginning July 1, 1943, through June 30, 1944, provided that, unless and until the Government shall give notice of [16] termination in accordance with provision 12 hereof, this lease shall remain in force thereafter from year to year

without further notice; provided further that adequate appropriations are available from year to year for the payment of rentals; and provided further that this lease shall in no event extend beyond six months from the date of the termination of the unlimited National Emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487).''

In Witness Whereof, the parties hereto have executed this instrument as of the day and year first above written.

/s/ MARK L. HERRON,
Lessor.

/s/ BARBARA W. HERRON,
THE UNITED STATES OF
AMERICA,

By /s/ THOMAS F. GROGHAN,
(Contracting officer)
Chief Los Angeles Sub-office.

Witness:

/s/ INEZ M. KEMPER,
2020 Beachwood Dr.,
Hollywood, California.

A True Copy

(If Lessor is a corporation, the following certificate shall be executed by the secretary or assistant secretary.)

I,, certify that I am the Secretary of the corporation named as Lessor in the attached agreement; that who signed said agreement on behalf of the Lessor was then of said corporation; that said agreement was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of the corporate powers.

[Corporate Seal.]

.....,
....., [17]

EXHIBIT C

Appendix

Presidential Proclamation 2487 of May 21, 1941, 6 F. R. 2617, 55 Stat. 1647, 50 App. U.S.C. Note prec. sec. 1, p. 5636, is as follows:

Proclaiming That an Unlimited National Emergency Confronts This County, Which Requires That Its Military, Naval, Air and Civilian Defenses Be Put on the Basis of Readiness to Repel Any and All Acts or Threats of Aggression Directed Toward Any Part of the Western Hemisphere

By the President of the United States of America

A Proclamation

Whereas on September 8, 1939, because of the

outbreak of war in Europe a proclamation was issued declaring a limited national emergency and directing measures "for the purpose of strengthening our national defense within the limits of peacetime authorizations,"

Whereas a succession of events makes plain that the objectives of the Axis belligerents in such war are not confined to those avowed at its commencement, but include overthrow throughout the world of existing democratic order, and a worldwide domination of peoples and economies through the destruction of all resistance on land and sea and in the air, and

Whereas indifference on the part of the United States to the increasing menace would be perilous and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as well as to repel the threat of [18] predatory incursion by foreign agents into our territory and society,

Now, Therefore, I, Franklin D. Roosevelt, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprise possible may survive.

I call upon all our loyal workmen as well as employers to merge their lesser differences in the larger effort to insure the survival of the only kind of government which recognizes the rights of labor or of capital.

I call upon loyal state and local leaders and officials to cooperate with the civilian defense agencies of the United States to assure our internal security against foreign directed subversion and to put every community in order for maximum productive effort and minimum of waste and unnecessary frictions.

I call upon all loyal citizens to place the nation's needs first in mind and in action to the end that we may mobilize and have ready for instant defensive use all of the physical powers, all of the moral strength and all of the material resources of this nation.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this twenty-seventh day of May, in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one hundred and sixty-fifth.

(Seal)

FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,
Secretary of State.

(No. 2487)

(F. R. Doc. 41-3808; filed May 28, 1941; 9:45 [19]
a.m.)

EXHIBIT D

Presidential Proclamation 2714 of December 31, 1946, 12 F. R. 1, 61 Stat. 1048, 50 App. U.S.C.S. 601 p. 5728, is as follows:

Cessation of Hostilities of World War II

By the President of the United States of America

A Proclamation

With God's help this nation and our allies, through sacrifices and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II effective twelve o'clock noon, December 31, 1946.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 31st day of December in the year of our Lord nineteen hundred forty-six, and of the Independence of the United States of America the one hundred and seventy-first.

(Seal)

HARRY S. TRUMAN.

By the President:

JAMES F. BYRNES,

The Secretary of State. [20]

EXHIBIT E

The National Archives of the United States
Federal Register

1934

Volume 15, Number 245

Page 9029

Washington, Tuesday, December 19, 1950

Title 3—The President

Proclamation 2914

Proclaiming the Existence of a
National Emergency

By the President of the United States of America

A Proclamation

Whereas recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

Whereas world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

Whereas, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the

right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining; the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

Whereas the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

Now, Therefore, I, Harry S. Truman, President of the United States of America, do proclaim the existence of a national emergency, which requires that the military, naval, air and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace.

I summon all citizens to make a united effort for the security and well-being of our beloved country and to place its needs foremost in thought and action that the full moral and material strength of the Nation may be readied for the dangers which threaten us.

I summon our farmers, our workers in industry, and our businessmen to make a mighty production effort to meet the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interests to the common good.

I summon every person and every community to make, with a spirit of neighborliness, whatever sacrifices are necessary for the welfare of the Nation.

I summon all State and local leaders and officials to cooperate fully with the military and civilian defense agencies of the United States in the national defense program.

I summon all citizens to be loyal to the principles upon which our Nation is founded, to keep faith with our friends and allies, and to be firm in our devotion to the peaceful purposes for which the United Nations was founded.

I am confident that we will meet the dangers that confront us with courage and determination, strong in the faith that we can thereby "secure the Blessings of Liberty to ourselves and our Posterity."

In Witness Whereof, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December (10:20 a.m.) in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

(Seal) HARRY S. TRUMAN.

By the President:

DEAN ACHESON,
Secretary of State.

EXHIBIT "F"

Department of State
Washington

August 6, 1951.

In reply refer to

WE 763.00/7-3051

Werner, Erwin P.

My dear Mr. Werner:

Reference is made to your letter of July 28, 1951, in which you asked several questions regarding relations between the United States and Austria.

Since the United States never declared war on Austria, a state of war does not exist between Austria and the United States. In the Moscow Declaration of November 1, 1943, the United States, Great Britain and the Soviet Union proclaimed that Austria was a victim of Hitlerite aggression and that the German annexation of Austria on March 15, 1938, was null and void. They expressed their desire that Austria be re-established as a free and independent country.

Under these circumstances there is no necessity for a peace treaty with Austria. Since January 14, 1947, the United States, Great Britain, France and the Soviet Union have conducted negotiations for an Austrian State Treaty with a view to ending the four-power occupation of Austria and settling Austrian problems arising from the war. The Council of Foreign Ministers had discussed this subject several times and the Deputies on the Austrian

Treaty, whom the Foreign Ministers appointed to negotiate the Treaty, have met no fewer than 258 times, the last meeting having been held in London in December, 1950.

The present Austrian Government is a coalition based on the two major parties, the People's Party and the Socialists, and is considered a stable, democratic government. The Communist Party, [22] which has not polled more than five per cent of the vote in any national election since 1945, is not a member of the coalition.

No reason exists to consider Austria a threat to the security of the United States within the meaning of the Presidential Proclamation of May 27, 1941.

Sincerely yours,

For the Secretary of State:

MONTGOMERY H.

COLLADAY,

Officer in Charge Italian-
Austrian Affairs.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 28, 1951. [23]

United States District Court, Southern District of
California, Central Division

No. 13,302-HW Civil

ERWIN P. WERNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ANSWER

Comes Now the United States of America, defendant herein, not admitting the jurisdiction of this court, but denying and disputing the same, and for answer to the First Amended Complaint herein says:

As to the First Cause of Action

First Defense

The United States of America has not consented and does not consent to be sued in this action, and this court was and is without jurisdiction.

Second Defense

The First Amended Complaint fails to state a claim against the defendant upon which relief can be granted.

Third Defense

Neither right of action set forth in the First Amended Complaint accrued within six years next before the commencement of this action. [35]

Fourth Defense

The declaration of an unlimited national emergency, as evidenced by Presidential Proclamation 2487, dated May 27, 1941, and the scope, effect, and duration thereof, are an executive function, not subject to judicial inquiry or control, and this court was and is without jurisdiction in the premises.

Fifth Defense

1. The defendant admits the allegations of paragraphs numbered I, V, VII, and VIII of plaintiff's First Amended Complaint.

2. The allegations of paragraph numbered II are denied.

3. The defendant is without knowledge as to when or whether the plaintiff became the owner of the property therein described, and can neither admit nor deny the same.

4. The defendant admits that on or about February 1, 1943 it made and entered into a lease with Mark L. Herron and Barbara W. Herron, husband and wife, of 1025 Chapman Building, Los Angeles, California, covering the property therein described, and on or about May 31, 1943, entered into a supplemental agreement affecting said lease, copies of which lease and supplement are attached to the First Amended Complaint as Exhibits A and B thereof.

5. Answering paragraph numbered VI of plaintiff's First Amended Complaint, the defendant ad-

mits that at the time of the execution of said lease and supplemental agreement the United States was at war with what were then generally known as the "Axis Belligerents," and at that time, that is to say, from and for a time after February 1, 1943, the "Axis Belligerents" consisted of the Imperial Government of Japan, Germany, Italy, and Austria, among others; but the defendant denies that the "Unlimited National Emergency" confronting the United States, as proclaimed by the President on May 27, 1941, Proclamation 2487, was based upon the "alignment of Axis belligerents" as it existed in 1943. At the time of the issuance of the Presidential proclamation [36] (Proclamation 2487), dated May 27, 1941, the "Axis Belligerents" included, among others, the Union of Soviet Socialist Republics, Germany, and Italy. Further answering said paragraph numbered VI, the defendant alleges that the unlimited national emergency declared by the President in Proclamation 2487 was not limited in effect, scope or operation by the identity of the powers constituting the "Axis Belligerents" on that date, but included all who then or thereafter lent aid and assistance to them or either of them; and that said unlimited national emergency, as declared in said Proclamation 2487, did not terminate until April 28, 1952, by Presidential Proclamation 2974 (17 Fed. Reg. 3813).

6. Answering paragraph numbered IX, the defendant denies that the unlimited national emergency, as proclaimed by the President of the United

States in Proclamation 2847, Exhibit C to the First Amended Complaint, terminated as a result or by reason of the facts, public acts, treaties, or declarations mentioned in said paragraph, or any or either of them, but says that said unlimited national emergency continued until the aforesaid Presidential Proclamation 2974 terminating it, issued on April 28, 1952, 17 Fed. Reg. 3813. Further answering paragraph numbered IX, the defendant denies that the leased property has or had a value of \$40,000, and denies that the defendant has failed or refused to pay the rental reserved in said lease and, on the contrary, alleges that it has offered and continues to offer the rentals reserved in said lease until the termination thereof, but that the plaintiff has declined and refused to accept the same or any part thereof.

7. Answering paragraph numbered X, the defendant denies that the unlimited national emergency, as declared by the President on May 27, 1941, Presidential Proclamation No. 2487, was terminated until April 28, 1952, as more particularly set forth in paragraph numbered 5 of this Fifth Defense.

8. Neither paragraph numbered XI or XII of the First Amended Complaint contains any allegations of fact, and no answer [37] thereto is required.

As to the Second Cause of Action

The defendant incorporates herein and pleads as a defense hereto all and singular, each and every,

the allegations and denials set forth in the first, second, third, fourth, and fifth defenses to the first cause of action.

Dated: January 25, 1954.

UNITED STATES OF
AMERICA,

LAUGHLIN E. WATERS,
United States Attorney;

JOSEPH F. McPHERSON,
Assistant United States
Attorney;

By /s/ JOSEPH F. McPHERSON,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 26, 1954. [38]

[Title of District Court and Cause.]

MEMORANDUM OF OPINION

On the 1st day of February, 1943, Mark L. Herron and Barbara W. Herron, husband and wife, entered into a lease with the United States of America, covering forty acres of land near the March Field air base at Riverside County, California. The lease provided for payment of \$25.00 per year rental, and further provided that occupancy of the premises could not be extended beyond "six months

from the date of the termination of the unlimited National Emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487).”

On May 17, 1948, Mr. and Mrs. Herron deeded the property covered by the lease to the plaintiff herein. Subsequent to said transfer, plaintiff filed an action in this [40] United States District Court praying that the lease be reformed so as to provide for its termination “six months from the date of cessation of the actual hostilities of the Axis Nations then at war or the surrender of said Axis Nations.” The government moved for dismissal of the action on several grounds, among them that the action was barred by the statute of limitations. The court found the action was so barred and dismissed it “for want of jurisdiction over the United States.” On appeal the District Court was affirmed (*Werner v. United States*, 188 F. 2d 266).

Subsequent to that decision Werner then brought this action, alleging a number of facts which, he claimed, brought the emergency to an end so far as it related to the lease in suit. The government did not choose to plead to the merits of the complaint as filed but pleaded the judgment in the earlier action as *res judicata*. This court examined the opinion as rendered by the Ninth Circuit in the Werner case, *supra*, and found therein a statement:

“There has been no ‘* * * termination of the unlimited national emergency * * *’ declared

by President Roosevelt on May 27, 1941, by Proclamation 2487.”

Upon the basis of that statement this court in the instant case further determined and decreed that the unlimited national emergency had not been terminated.

In *Werner v. United States*, 198 F. 2d 882, the Ninth Circuit, commenting upon its previous decisions, said:

“* * * We hold that this court did no more than affirm the judgment appealed to it. In our opinion we did state that there had been [41] no termination of the emergency but this statement was a mere recital of the undisputed fact that no official termination of the emergency had been pronounced.”

The Circuit then reversed and remanded the case, stating:

“* * * Appellant is entitled to his day in court * * *”

The matter now comes on for hearing for the third time—to give plaintiff his “day in court” as directed by the Circuit. At the hearing plaintiff did not in any manner attempt to prove any basis for the allegations contained in his amended complaint to show the national emergency had been brought to an end but, instead, contended the national emergency was terminated by a Joint Resolution of Congress dated July 25, 1947, Public Law

239, 80th Cong., 1st Sess., Chapter 327 (61 Stat. 449).

Section 3 of the Joint Resolution recites:

“In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941.”

It is plaintiff's contention that the lease in question was acquired under § 171, Title 50, U.S.C.A., and that this Act was specifically mentioned in Section 3 of the Act of July 2, 1917, as amended. [42]

The government contends the national emergency was not terminated by the Joint Resolution of Congress but, on the other hand, was terminated by an official proclamation made by the President on April 28, 1952, in which is stated:

“Now, Therefore, I, Harry S. Truman, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day * * *”
[66 Stat. C31 at C32].

If the national emergency with which we are concerned in this litigation was terminated by the Joint Resolution of Congress on July 25, 1947, plaintiff is entitled to a recovery in this action. On

the other hand, if the national emergency did not terminate until President Truman's Proclamation on April 28, 1952, plaintiff is not entitled to judgment.

The problem thus presented is two-fold:

1. Can a national emergency proclaimed by the President be terminated by Congress, and
2. If Congress may terminate a national emergency, did the Joint Resolution of July 25, 1947, terminate the national emergency as proclaimed by President Roosevelt?

There has been no contention that anyone other than the President may issue a Proclamation determining the existence of a national emergency. There is no suggestion that the other two branches of government, or either of them—judicial or legislative—may in any way usurp the duties of the President by declaring the existence of a national emergency. If the President is the only one who may [43] declare a national emergency, is he alone empowered to terminate it?

The Supreme Court discusses the problems here involved in *Ludecke v. Watkins*, 335 U. S. 160 at 170, as follows:

“The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that ‘a state of war still exists.’ * * * The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion

that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President * * * These are matters of political judgment for which judges have neither technical competence nor official responsibility."

It seems to this court the determination that a national emergency existed is a matter of political judgment, and determination that the national emergency no longer exists is also a matter of political discernment, which judges have "neither technical competence nor official responsibility" to decide. If this is a matter which has been given exclusively to the executive branch of government and the judicial branch has no official responsibility therein, it would also seem to this court that the legislative branch has no right to determine matters of political judgment.

This point of view is substantiated by the President's action when (even though Congress by a Joint Resolution on July 25, 1947, determined the national emergency [44] had ceased) he, nevertheless, on April 28, 1952, issued a proclamation definitely declaring the national emergency as proclaimed by the President on May 27, 1941, "terminated this day." And further substantiation for this point of view is found in the opinion of the United States Supreme Court in *Knauff vs. Shaughnessy*, 338 U. S. 537, decided January 25,

1950, nearly three years after the date of the Joint Resolution. The Supreme Court said, at page 546:

“* * * The national emergency has never been terminated. Indeed, a state of war still exists.”

Plaintiff at bar contends, however, that the foregoing opinion is not in point because the Supreme Court was discussing legislation relative to war brides, and the statement that “the national emergency has never been terminated” must be restricted to the War Brides Act. The Court says, page 546:

“* * * The special procedure followed in this case was authorized not only during the period of actual hostilities but during the entire war and the national emergency proclaimed May 27, 1941.”

It is after this quoted statement that the Court goes on to say: “The national emergency has never been terminated.”

If we read into the Supreme Court’s statement, “in respect to the War Brides Act,” we are interpolating. It may be true that the Circuit Court may determine the Supreme Court did nothing more than affirm the judgment of the lower court, but, as we read the case, here is a statement that the national emergency had not been terminated; and in the light [45] of other authorities this court is of the opinion that the national emergency as proclaimed by the President on May 27, 1941, was

not legally and officially terminated until April 28, 1952, when the President of the United States issued a proclamation in which he stated the national emergency had been "terminated this day."

As a consequence, this court is of the opinion that Congress by its Joint Resolution did not terminate the national emergency and, therefore, the plaintiff in this action is not entitled to recover.

Findings of Fact, Conclusions of Law and Judgment in conformity with this opinion will be prepared by defendant for presentation for signature on or before the 15th day of March, 1954.

Dated: March 1, 1954.

/s/ HARRY C. WESTOVER.

District Judge.

[Endorsed]: Filed March 2, 1954. [46]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on to be heard, before the United States District Court for the Southern District of California, the Honorable Harry C. Westover, District Judge, presiding, sitting without a jury, on the 5th day of February, 1954, and was concluded that day. Evidence was introduced by both parties, the case was argued, points and

authorities were filed on behalf of the defendant, and the matter submitted. The court, being fully advised in the premises and having filed its Memorandum of Opinion herein on March 2, 1954, now makes its findings of fact and conclusions of law, as follows:

Findings of Fact

1. On February 1, 1943, Mark L. Herron and Barbara W. Herron, his wife, being the record owners thereof, made and entered into a written lease with the defendant covering the property in Riverside County, California, described as the Southeast quarter (SE $\frac{1}{4}$) of the Southeast quarter (SE $\frac{1}{4}$) of Section 16, Township 3 South, Range 4 West, S. B. B. & M., containing 40 acres, more or less, for a renewable term, with a reserved rental of \$25.00 per annum. [47]

On May 31, 1943, the parties to said lease made and entered into a supplemental agreement which, among other things, dispensed with the necessity of notice of renewal and provided:

“3. To Have and to Hold the said premises with their appurtenances for the term beginning July 1, 1943, through June 30, 1944, provided that, unless and until the Government shall give notice of termination in accordance with provision 12 hereof, this lease shall remain in force thereafter from year to year without further notice; provided further that adequate appropriations are available from year to year

for the payment of rentals; and provided further that this lease shall in no event extend beyond six months from the date of the termination of the unlimited National Emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487).''

2. The national emergency referred to in said lease, as supplemented, was declared by the Honorable Franklin Delano Roosevelt, President of the United States, by Proclamation No. 2487, dated May 27, 1941.

3. Said national emergency, so declared by the Honorable Franklin Delano Roosevelt, continued to and until April 28, 1952, when it was terminated by the Honorable Harry S. Truman, President of the United States, by Proclamation No. 2974, which, among other things, provides:

“Now, Therefore, I, Harry S. Truman, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day * * *” [66 Stat. C31 at C32.]

4. On May 17, 1948, the plaintiff herein acquired the property in question by deed from the said Mark L. Herron and Barbara W. Herron, his wife, is presently the owner thereof, and is entitled to the unpaid rentals as reserved in said lease as [48] supplemented.

5. The rentals reserved in said lease as supple-

mented, from and after the 30th day of June, 1945, have not been paid, but were duly and lawfully tendered to the plaintiff, were refused, and the plaintiff is not entitled to any interest thereon.

6. During all the dates and times mentioned herein, prior to April 28, 1952, there was valid and subsisting statutory authority authorizing the defendant to acquire or lease the property herein, other than 50 U.S.C.A. 171.

Conclusions of Law

The court adopts and by reference incorporates herein as its conclusions of law its Memorandum of Opinion, filed herein on March 2, 1954.

Let judgment be entered herein in accordance herewith.

Dated: This 16th day of March, 1954.

/s/ HARRY C. WESTOVER,
District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney;

JOSEPH F. McPHERSON,
Assistant U. S. Attorney;

By /s/ JOSEPH F. McPHERSON,
Attorneys for Defendant.

[Endorsed]: Filed March 16, 1954. [49]

United States District Court, Southern District of
California, Central Division

No. 13,302-HW Civil

ERWIN P. WERNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINAL JUDGMENT

The above-entitled cause coming on to be heard, before the United States District Court for the Southern District of California, the Honorable Harry C. Westover, District Judge, presiding, sitting without a jury, on the 5th day of February, 1954; the parties appearing by counsel, evidence having been introduced, the court being fully advised in the premises, having filed herein its Memorandum of Opinion and Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Adjudged, Ordered and Decreed:

I.

That the lease between plaintiff's predecessors in title and the defendant, dated February 1, 1943, as supplemented by written agreement dated May 31, 1943, was a valid and subsisting lease to and until October 28, 1952.

II.

That the rentals therein reserved at the rate of \$25.00 per annum from and after the 30th day of

June, 1945, have not been paid, though due and lawfully tendered to and refused by the plaintiff. [50]

III.

That the plaintiff have and recover from the defendant the sum of \$183.15, being the unpaid rental for the period June 30, 1945, to October 28, 1952, without interest.

IV.

That the defendant have and recover of and from the plaintiff herein its costs in this behalf sustained, now here taxed at \$20.00.

Dated: This 16th day of March, 1954.

/s/ HARRY C. WESTOVER,
District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney;
JOSEPH F. McPHERSON,
Assistant U. S. Attorney;

By /s/ JOSEPH F. McPHERSON,
Attorneys for Defendant.

Approved as to Form:

.....,

MORRIS LAVINE,
Attorney for Plaintiff.

[Endorsed]: Filed March 16, 1954.

Docketed and entered March 17, 1954. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

Comes Now the plaintiff, Erwin P. Werner, and files his written notice of appeal from that certain order and judgment rendered by the Honorable Harry C. Westover, Judge of the United States District Court for the Southern District of California, in the above-entitled action to the United States Court of Appeals for the Ninth Circuit of the United States of America.

Dated: April 9, 1954.

/s/ MORRIS LAVINE,

Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed April 13, 1954. [52]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 58, inclusive, contain the original First Amended Complaint; Special Appearance and Motion to Dismiss; Order for Dismissal; Mandate; Answer; Memorandum of Opinion; Findings of Fact and Conclusions of Law; Final Judgment;

Notice of Appeal; Praecipe and Two Orders Extending Time to Docket Appeal which, together with Reporter's Transcript of Proceedings on February 3, 1954, and Original Exhibits, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 30th day of July, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14410. United States Court of Appeals for the Ninth Circuit. Erwin P. Werner, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 1, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14410

ERWIN P. WERNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

POINTS UPON WHICH APPELLANT
INTENDS TO RELY ON APPEAL

The appellant assigns the following as Points upon which he intends to rely on appeal for reversal of the judgment below:

I.

The National Emergencies as proclaimed by the President, on September 8, 1939, and on May 27, 1941, were both terminated by Congress by joint resolution, dated July 25, 1947, Public Law 239, 80th Congress, 1st Session, Chapter 327 (61 Stat. 449).

II.

That as a consequence thereof the lease entered into by and between the plaintiff and defendant on the 1st day of February, 1943, was ipso facto terminated July 25, 1947 (and was not valid until Oct. 28, 1952).

III.

That the President of the United States, without

the authority of Congress, has no authority to create or terminate an emergency.

IV.

That Congress has Constitutional power to terminate an emergency declared by the President.

V.

That the contract in the instant case did not provide for or require its termination by presidential decree. The contract itself provided the event of its termination, whether by the President or Congress.

VI.

That the President of the United States has no constitutional power to terminate private contracts.

VII.

The Trial Court erred in not awarding plaintiff interest from six months after July 25, 1947, to date.

The plaintiff designates as parts of the record on which he relies:

- (1) Complaint.
- (2) Answers.
- (3) Memorandum of Opinion by lower court, and
- (4) Findings of Fact and Conclusions of Law. and Judgment.

Notice of Appeal.

/s/ MORRIS LAVINE,

Attorney for Appellant.

[Endorsed]: Filed July 10, 1954.

No. 14410

In the
United States Court of Appeals
For the Ninth Circuit

ERWIN P. WERNER,	} <i>Appellant,</i>
vs.	
UNITED STATES OF AMERICA,	
	} <i>Appellee.</i>

Appellant's Opening Brief

MORRIS LAVINE
215 West 7th Street
Los Angeles 14, California
Attorney for Appellant.

FILED

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PAUL P. O'BRIEN
CLERK

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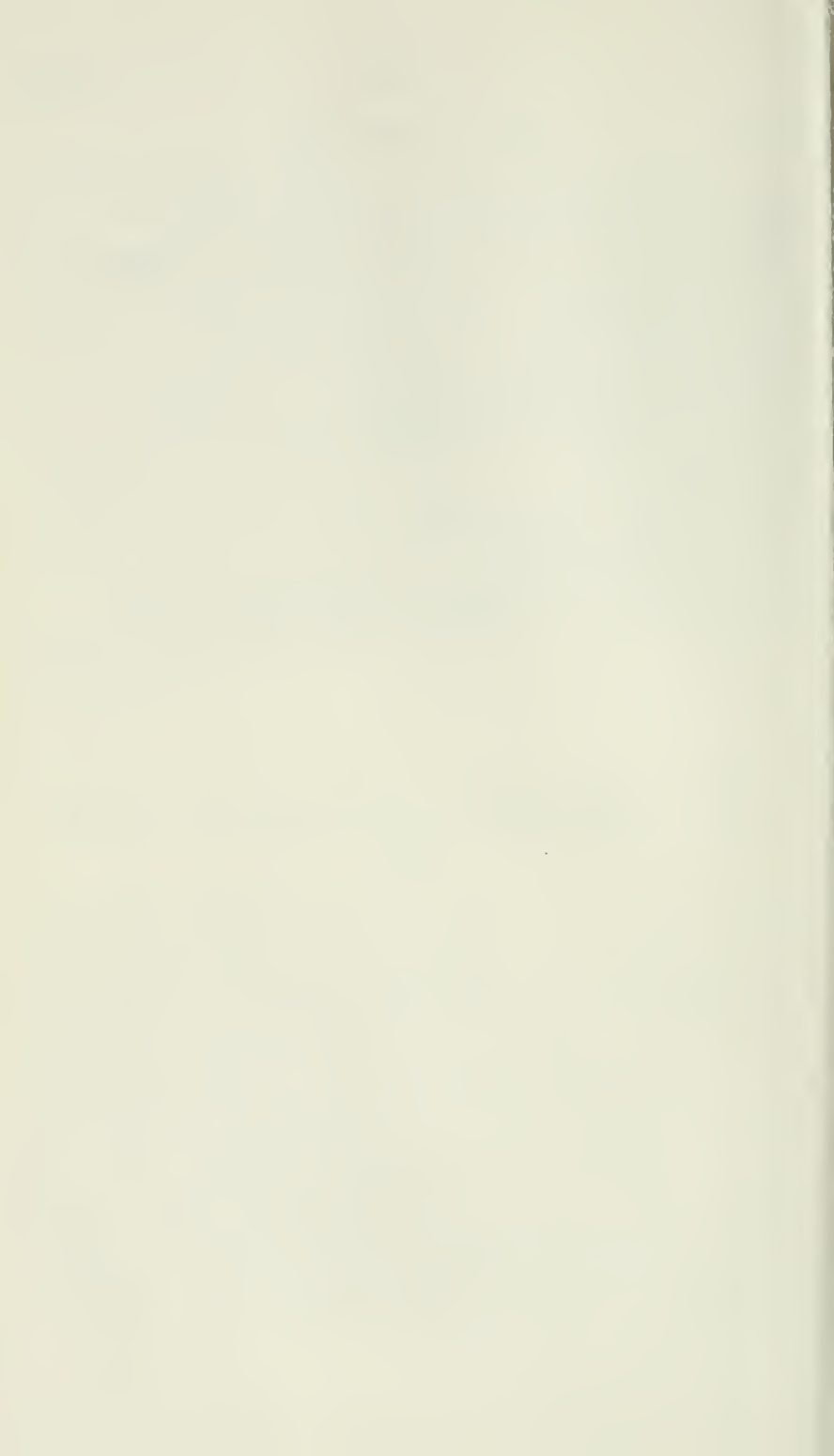
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In the
United States Court of Appeals
For the Ninth Circuit

ERWIN P. WERNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 14410

Appellant's Opening Brief

*To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:*

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1291,
U. S. Codes.

The decision of the District Court of the United
States was rendered March 16, 1954 (R. 48). Notice
of Appeal was filed April 9, 1954. (R. 50).

STATUTES AND PROCLAMATIONS INVOLVED
Proclamation 2487

Proclamation 2487 provides as follows: "Presi-
dential Proclamation 2487 of May 21, 1941, 6 F. R.

2617, 55 Stat. 1647, 50 App. U. S. C. Note prec. sec. 1, p. 5636, is as follows:

Proclaiming That an Unlimited National Emergency Confronts This Country, Which Requires That Its Military, Naval, Air and Civilian Defenses Be Put on the Basis of Readiness to Repel Any and All Acts or Threats of Aggression Directed Toward Any Part of the Western Hemisphere

By the President of the United States of America
A Proclamation

Whereas on September 8, 1939, because of the outbreak of war in Europe a proclamation was issued declaring a limited national emergency and directing measures 'for the purpose of strengthening our national defense within the limits of peacetime authorizations.'

Whereas a succession of events makes plain that the objectives of the Axis belligerents in such war are not confined to those avowed at its commencement, but include overthrow throughout the world of existing democratic order, and a worldwide domination of peoples and economies through the destruction of all resistance on land and sea and in the air, and

Whereas indifference on the part of the United States to the increasing menace would be perilous and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as

well as to repel the threat of [18] predatory incursion by foreign agents into our territory and society,

Now, Therefore, I, Franklin D. Roosevelt, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprise possible may survive.

I call upon all our loyal workmen as well as employers to merge their lesser differences in the larger effort to insure the survival of the only kind of government which recognizes the rights of labor or capital.

I call upon loyal state and local leaders and officials to cooperate with the civilian defense agencies of the United States to assure our internal security against foreign directed subversion and to put every community in order for maximum productive effort and minimum of waste and unnecessary frictions.

I call upon all loyal citizens to place the nation's needs first in mind and in action to the end that we may mobilize and have ready for instant defensive use all of the physical powers, all of the moral strength and all of the material resources of this nation.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this twenty-seventh day of May, in the year of our Lord nineteen hundred and forty-one, and of the Independence of the United States of America the one-hundred and sixty-fifth.

(Seal) FRANKLIN D. ROOSEVELT."

(R. 23-25, Exhibit C)

The Joint Resolution of July 25th, 1947 of Congress

The Joint Resolution of July 25th, 1947 of Congress provides as follows:

80th Congress, 1st Session, Ch. 327—July 25, 1947.

JOINT RESOLUTION

To Terminate Certain Emergency and War Powers.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the following statutory provisions are hereby repealed:

* * *

Sec. 3. In the interpretation of the following provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and May 27, 1941.

Title 50, Section 171, U. S. Code, Section 3

Title 50, Section 171, U. S. Code, Section 3, provides as follows:

171. Acquisition of lands; authority of Secretary of the Army; condemnation, purchase, and donation; emergency provisions.

The Secretary of Army may cause proceedings to be instituted in the name of the United States in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operation of such plants. Such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted:

Provided, that when the owner of such land interest or rights pertaining thereto shall fix a price for the same which in the opinion of the Secretary of the Army shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay;

Provided, further, that the Secretary of the Army is authorized to accept on behalf of the United States donations of land and the interest

and rights pertaining thereto required for the above mentioned purposes;

And provided, further, that when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof, or other interest therein, right pertaining thereto be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes. (Aug. 18, 1890, ch. 797; 26 Stat. 316; July 2, 1917, ch. 35, 40 Stat. 241; April 1, 1918, Ch. 54, 40 Stat. 518, July 26, 1947, ch. 343, Title II; par. 205 (a), 61 Stat. 501.)

Proclamation of the President of April 28, 1952

The Proclamation of the President of April 28, 1952 provides as follows:

TITLE 3 — THE PRESIDENT PROCLAMATION 2974

TERMINATION OF THE NATIONAL EMERGENCY PROCLAIMED ON SEPTEMBER 8, 1939 and MAY 27, 1941

By the President of the United States of America

A Proclamation

WHEREAS by Proclamation No. 2352 of September 8, 1939, the President proclaimed the existence of a national emergency in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutral-

ity of the United States of America and the strengthening of our national defense within the limits of peace-time authorizations; and

WHEREAS by Proclamation No. 2487 of May 27, 1941, the President proclaimed the existence of an unlimited national emergency, requiring that the military, naval, air and civilian defenses of this country be put on the basis of readiness to repel any and all acts or threat of aggression directed toward any part of the Western Hemisphere; and

WHEREAS acts of aggression against the United States of America by Axis Powers subsequently led to declarations by the Congress of the existence of states of war between the United States of America and Japan, Germany, Italy, Hungary, Rumania and Bulgaria; and

WHEREAS the state of war between the United States of America and Japan, which was the last of the aforesaid states of war still existing, was terminated by the coming into force this day of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951;

NOW THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day upon the entry into force of the Treaty of Peace with Japan.

Nothing in this Proclamation shall be construed to affect Proclamation No. 2914, issued by the President on December 16, 1950, declaring

that world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world, and proclaiming the existence of a national emergency requiring that the military, naval, air and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace; and nothing herein shall be construed to affect the continuation of the said emergency of September 8, 1939, as specified in the Emergency Powers Interim Continuation Act, approved April 14, 1952 (Public Law 313—82d Congress), for the purpose of continuing the use of property held under the Act of October 14, 1940, ch. 862, 54 Stat. 1125, as amended,

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this twenty-eighth day of April in the year of our Lord nineteen hundred and fifty-two, and of the Independence of the United States of America the one hundred and seventy-sixth.

HARRY S. TRUMAN

By the President:

Dean Acheson,

Secretary of State.

QUESTIONS RAISED BY THIS APPEAL

(1) Whether the Joint Resolution of Congress of July 25, 1947, Public Law 239, terminated the National Emergency as proclaimed by the President on September 8, 1939 and continued on May 27, 1941.

(2) Whether the plaintiff, by reason thereof, is entitled to rent from the date of the termination of the national emergency as declared by the Act of Congress, on land which he and his wife owned in Riverside County, California, and for which there was a lease which extended only six months beyond the unlimited national emergency as declared by the President in his proclamation of May 27, 1941—Proclamation 2487.

(3) Whether the lease contract of plaintiff expired July 25, 1947 and plaintiff is therefore entitled to recover for use of land from six months thereafter.

STATEMENT OF FACTS

The plaintiff in this action owned 40 acres of land near March Field Airbase at Riverside County, California. The property had originally been owned by Mark L. Herron and Barbara Herron, his wife, who, entered into a lease with the United States of America for the land upon the payment of \$25.00 per year rental and provided that occupancy at this rate could not be extended beyond six months from the date of the termination of the unlimited national emergency as declared by the President of the United States on May 27, 1941.

On May 17th, 1948, Mr. and Mrs. Herron deeded the property covered by the lease to the plaintiff. Subsequent to his acquisition, plaintiff filed an action in the United States District Court praying that the lease be reformed so as to provide for its termination "six months from the date of the actual cessation of hostilities of the Axis nations then at war or the surrender of said Axis nations." The Government moved for dismissal of the action on the ground that it was barred by the Statute of Limitations. The Circuit Court affirmed the judgment, whereupon Mr. Werner, the plaintiff, then brought the present action in which he alleged that the number of facts that brought the emergency to an end so far as it related to the present lease. The government pleaded *res judicata* as its defense, but on review this court said:

" . . . We hold that this court did no more than affirm the judgment appealed to it. In our opinion we did state that there had been no official termination of the emergency but this statement was a mere recital of the undisputed fact that no official termination of the emergency had been pronounced."

The Court then reversed and remanded the case, stating:

" . . . Appellant is entitled to his day in court . . . " (*Werner v. United States*, 198 Fed. (2d) 882.)

At the time the case was formerly before the court, neither this court's attention nor the court's below was

called to Public Law 239, 80th Cong. 1st Sess., Chapter 327, dated July 25, 1947. Thus the Congress itself by reason of that enactment held that the National Emergency was terminated, by act of Congress. The Government, on the other hand, contended that the Congress had no authority to terminate the national emergency as proclaimed by the President and only the President could so terminate the national emergency, and that the national emergency was not terminated until President Truman's proclamation on April 28, 1952, and therefore the plaintiff is not entitled to judgment.

In this view of the matter, the District Court upheld the government and rendered judgment in favor of the Government.

In this, we respectfully contend, the District Court erred.

SUMMARY OF ARGUMENT

A National Emergency proclaimed by the President is merely a statement of an existing condition which terminates upon the ending of that Condition. The lease in question only required the termination of the unlimited national emergency; it did not require a Proclamation by the President to terminate it. When Congress, by joint resolution, declared the unlimited national emergency ended, it had the same effect as if the President had done so. The Congress of the United States has authority to declare the national emergency ended.

SPECIFICATIONS OF ERRORS

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE NATIONAL EMERGENCY WAS NOT TERMINATED AS OF JULY 25, 1947, AND THAT THE JOINT RESOLUTION OF CONGRESS OF JULY 25, 1947 DID NOT HAVE THAT EFFECT.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT A NATIONAL EMERGENCY PROCLAIMED BY THE PRESIDENT MAY NOT BE TERMINATED BY A JOINT RESOLUTION OF CONGRESS.

III.

THE DISTRICT COURT ERRED IN NOT ALLOWING THE PLAINTIFF RENT FROM THE DATE OF HIS ACQUISITION OF THE PROPERTY, BASED UPON THE REASONABLE VALUE OF THE LAND, WHICH THE GOVERNMENT CONTINUED TO USE AFTER THE TERMINATION OF THE UNLIMITED NATIONAL EMERGENCY FOR THE GOVERNMENT AIRBASE.

. . .

ARGUMENT

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE NATIONAL EMERGENCY WAS NOT TERMINATED AS OF JULY 25, 1947, AND THAT THE JOINT RESOLUTION OF CONGRESS OF JULY 25, 1947 DID NOT HAVE THAT EFFECT.

At the outset, we must consider the purpose and need of a proclamation.

A proclamation is defined as follows:

“ ‘Proclamation’ is defined as meaning the act of proclaiming or publishing, any announcement made in a public manner; a publication; a declaration or notice by public outcry; a formal declaration; an avowal. The word is also used to express the public nomination made of any one to a high office.

In law, ‘proclamation’ is defined as meaning an announcement made by a ministerial officer of a court of something to be done; an official notice given to the public; an official public notification by some executive authority of the occurrence of an event important to the public, or of command, caution, or warning in relation to a matter impending; a notice publicly given of anything whereof the executive thinks fit to inform and notify the public; a public notice by an official of some order, an intended action, or some state of facts; a public notice in writing given by a state or city official of some act done by the

government, or to be done by the people; a publication by authority.

Presidential proclamations are discussed generally in the *C. J. S.* title United States § 30, also 65 *C. J.* p. 1271 notes 66-73; and a proclamation of the president of the United States reserving public lands from sale is treated in Public Lands § 74." (72 *C. J. S.* page 1205).

And, in 65 *C. J.* page 1271, § 32b. Proclamations and Orders:

"A proclamation by the president is his official and public announcement of an order. No particular form of such announcement is necessary. The president may issue proclamations when he thinks it is proper to give notice or information to the public, but it has been said that they have no effect as law in the absence of constitutional or congressional authorization."

Having proclaimed a state of national emergency by proclamation, it merely stated a condition and gave notice or information to the public as to an emergency, which became effective on the date of the proclamation. (65 *C. J.* 1271, Sec. 32). The termination of that emergency could be declared by the joint resolution or act of Congress, as it was in this case, on July 25, 1947.

The court below confused the termination of the national emergency with the proclamation to its termination, or its official declaration of termination.

The lease only provided that the occupancy of the premises was to terminate six months after the ter-

mination of the national emergency. The national emergency referred to was that declared by the President in Proclamation 2487. The lease did not provide that it would not expire until the president issued another proclamation. Indeed, the national emergency could have terminated and might have been established even without any proclamation. The proclamation itself was only an official declaration that it had terminated.

Since Congress officially declared it to be terminated by its Joint Resolution of July 25, 1947, and plaintiff's acquisition of the property did not take place until 1948, we were willing to accept without further evidence the official declaration by Congress that the unlimited national emergency had in fact terminated.

The President cannot create an emergency. He may merely proclaim its existence. Without some connection with power granted by the Constitution or Congress, it is without legal significance. To give a proclamation power the lower court attaches to it, would be to give it legislative power and, therefore, it would be unconstitutional. A proclamation is just what the word means.—To proclaim.

In *Muir v. Louisville & N. H. Co.*, 247 Fed. 888, the court said:

“ . . . The President may issue proclamations when he thinks it proper to give notice or information to the public, but it is said they have

no effect in law in the absence of constitutional or congressional authorization.”

Definition of Proclamation in Bouviers Law Dictionary:

“PROCLAMATION. The act of proclaiming or making publicly known certain affairs of state. A written or printed document in which are contained such matters, issued by proper authority, as the President’s proclamation, the Governor’s, the Mayor’s proclamation . . .

The President may give force to law, when authorized by Congress; as, if Congress were to pass an act, which should take effect upon the happening of a contingent event, which was to be declared by the President by proclamation to have happened, in this case the proclamation would give the act the force of law, which till then is wanted. . . .

On the breaking out of war, it is usual for a nation to issue a proclamation announcing the existence of hostilities. See manifesto; War.

“In English law the instrument is thus defined:

“Proclamation (Proclamatio) is a notice publicly given of anything whereof the King thinks fit to advise his subjects.” *Lapayre v. United States*, 84 U. S. 191, 195.

“The proclamation of the President is his official, public announcement of an order. No particular form of such announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained.” *Wood v. Beach*,

156 U. S. 548. Also, see, *Simon v. Moore*, 261 Fed. 638; *Carter v. Territory*, 1 N. M. 317; *Machin v. State*, 62 Md. 244 (They quote Webster's Dist.); *Barrett v. Hitchcock*, 241 Mo. 433.

It will also be disclosed that each and every case upon which the court below relies, wherein the President is authorized to effect certain political acts, was first authorized so to do by congressional act.

The first case cited by the court was the enemy alien act of 1798, construed in *Kurt G. Luecke vs. Walkins*, 335 U. S. 160. The opinion of the court opens by quoting pertinent part of the act as follows:

“*Whenever there is a declared war between the United States and any foreign nation or government,—and the President makes public proclamation of the event—The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; . . .*”

The decision, at page 164, further speaks of the power which Congress gave to the President:

“The power with which Congress vested the President had to be executed by him through others.”

The same opinion explains what the court means by a political act. Quoting further from the opinion, at page 168:

“ ‘The State of War’ may be terminated by treaty, or *legislation* or *presidential proclamation*, whatever its mode its ‘termination’ is a political act.”

But it is also true that when the President terminates existing laws or statutes, he must have been first authorized by an act of Congress so to do. An illustration is in the War Brides Act, which is construed in *Knauff v. Shaughnessy*, 338 U. S. 537.

The court below, in attempting to digest the above case, states at page 43 Tr.:

“If we read into the Supreme Court’s statement ‘in respect to the War Brides Act,’ we are interpolating.”

But, if the *Shaughnessy* case was read in its entirety it would have been found, on page 545, that the Supreme Court made the pertinent parts of the act part of its decision:

“She contends that the War Brides Act, applicable portions of which are set out in the margin, (note 8)”

Then the court sets applicable parts which contain Section 5 of the Act which reads as follows:

“5. For the purpose of this act, the second world war shall be deemed to have commenced on December 7, and to have ceased upon the termination of *hostilities* as declared by the President or by *joint resolution of Congress*.”

We also find, on page 545 supra, the following:

“The beginning and the end of the war are defined by the War Brides Act, . . . ”

This means, as stated in Section 5, from December 7, 1941 until the war is terminated by President proclamation or by act of Congress.

It was the contention of the plaintiff in the *Shaughnessy* case that the War Brides Act terminated on the cessation of hostilities, but the court pointed out that the act itself provided that it remained in force until termination by Presidential proclamation or by act of Congress.

In the case at bar, the parties to the lease did not contract to terminate the said lease by Presidential proclamation, so therefore the joint resolution of July 25th, 1947, effectually terminated said lease.

The lease itself provides that in no event shall the lease extend more than 6 months after the termination of the unlimited emergency. Is it possible that Congress, as representing the different agencies of government, cannot determine the end of the unlimited emergency so as to release itself from the obligations of its contract?

The Constitution outlines the duties of Congress, which are found in Article 1, Section 1 to and including Section 18. There will be found ample authority for terminating one of its contracts.

Article 11 outlines the duties of the President and we find them to be rather limited. He is defined as the executive officer of the Government. The President is the executive head of the Government. To attribute to the executive legislative powers would be clearly unconstitutional.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT A NATIONAL EMERGENCY PROCLAIMED BY THE PRESIDENT MAY NOT BE TERMINATED BY A JOINT RESOLUTION OF CONGRESS.

The second problem as poised by the lower court's opinion, and found on page 41 of the record, is as follows:

“2. If Congress may terminate a national emergency, did the joint resolution of July 25, 1947, terminate the national emergency as proclaimed by President Roosevelt?”

The joint resolution specifically mentions both proclamations, including the one in 1941.

The joint resolution also mentions at least one hundred other statutes based on the termination of the unlimited emergency here in question.

Must these different statutes await the general proclamation in 1952, terminating the emergency? No.

The presidential proclamation was a "mop up" and terminated all legislation not terminated by the Congress, and which statute authorized the President so to do. It was also generally informative to the public at large.

The lower court (R. 41) also asks the question, or states that:

"There has been no contention that anyone other than the President may issue a proclamation . . . "

Any governmental head, such as a Mayor, may issue a proclamation. We answer they have no legal significance unless empowered by legislative enactment. He also states that:

"There is no suggestion that the other two branches of government, or either of them—judicial or legislative—may in any way usurp the duties of the President by declaring the existence of a national emergency."

We say the function of declaring an emergency to be in existence has no legal significance unless connected with legislative action. We did not contract to await a presidential proclamation to terminate the lease in question.

The court below confuses the act of informing the public that an emergency exists with the fact of creating an emergency. And last, by the Court (R. 41):

“If the President is the only one who may declare a national emergency, is he alone empowered to terminate it?”

I do not believe that the President, whether it be Roosevelt or Eisenhower, would accept the responsibility of either creating an unlimited emergency or ending it, other than the present responsibility of terminating certain legislative enactments on the happening of a certain event.

The asking of these questions illustrates the complete confusion in the matter, and which will require a clear cut decision by this court before this very simple matter is concluded. The problem can be clearly demonstrated by citing a case which is fundamental and has been cited in all cases bearing on the point. We refer to *Hamilton v. Kentucky Distilleries*, 251 U. S. 153.

This case has to do with the termination of war time prohibition under World War I. The question in that case was whether war time prohibition should cease on the cessation of hostilities or whether it should await the proclamation of the President of the United States. We quote from the decision, page 153:

“That after June 14th, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of the demobilization, the date which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the manpower of the nation . . . ”

Can it possibly be claimed that the President of the United States could, by proclamation, terminate war time prohibition, without first having been empowered by the Congress so to do?

CONCLUSION

In conclusion, let us say, that the joint resolution of July 25th, 1947, terminated the unlimited emergency here in question in so far as it related to all of the statutes mentioned in Subdivision 3 thereof. These statutes so mentioned did not await the proclamation made five years later, which only effected statutes which in themselves authorized the President to end their effectiveness by proclamation.

This is the third time this matter has been submitted to this Court for action, but this is the first time that the court's attention has been called to the Joint Resolution of July 25, 1947, bringing an end to the emergency as proclaimed by the President May 27, 1941, in so far as it related to the statute under which this lease was entered into.

We, therefore, submit that the decision of the lower court be reversed with instructions to allow compensation to plaintiff for the use of plaintiff's land from the date of his acquisition after the effective date of the joint resolution.

Respectfully submitted,

MORRIS LAVINE

Attorney for Appellant.

No. 14410

In the United States Court of Appeals
for the Ninth Circuit

ERWIN P. WERNER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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FILED

JAN 7 1955

**PAUL P. O'BRIEN,
CLERK**

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(I)



In the United States Court of Appeals for the Ninth Circuit

No. 14410

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BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court's opinion (R. 37-44) is reported at 119 F. Supp. 894.

JURISDICTION

The district court's jurisdiction rested on 28 U. S. C., sec. 1346 (a). Judgment was entered on March 17, 1954 (R. 48-49). Notice of appeal was filed on April 9, 1954 (R. 50). The jurisdiction of this Court is invoked under 28 U. S. C., sec. 1291.

PRESIDENTIAL PROCLAMATIONS INVOLVED ¹

So far as material, the Proclamation (No. 2487) of May 27, 1941, 55 Stat. 1647, declares:

¹ Section 3 of the Joint Resolution approved July 25, 1947, 66 Stat. 451, is set out in the Argument at p. 6, *infra*.

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

So far as material, the Proclamation (No. 2973) of April 8, 1952, 66 Stat. C31, declares (C32):

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day upon the entry into force of the Treaty of Peace with Japan.

QUESTION PRESENTED

Whether, when the terms of a lease provide that it is to terminate six months "from the date of the termination of the unlimited National Emergency, as declared by the President * * * on May 27, 1941," it continues until six months after a subsequent Proclamation of the President declaring the termination of the national emergency proclaimed on May 27, 1941, notwithstanding his earlier approval of a Joint Resolution of Congress terminating authority for new acquisitions under Acts of Congress which are in effect only during periods of war or national emergency.

STATEMENT

On February 1, 1943, Mark L. Herron and his wife leased to the United States about 40 acres of land for

\$25 a year (R. 13-20; see also R. 20-22). The lease was to terminate six months "from the date of the termination of the unlimited National Emergency, as declared by the President * * * on May 27, 1941 (Proclamation 2487)" (R. 15, 22).

On May 17, 1948, appellant became owner of the leased property and on July 23, 1951, filed this suit (R. 3-32).² He alleged that the unlimited national emergency proclaimed on May 27, 1941, had ended by virtue of a series of events (R. 6-11), that consequently the lease terminated "between May 7, 1948, and December 6, 1950" (R. 12), and that he was entitled to \$10,000 for the Government's subsequent use of the land (R. 12-13).

After this Court reversed the trial court for dismissing the complaint on the ground of *res adjudicata*, *Werner v. United States*, 198 F. 2d 882 (1952), the United States answered (R. 33-37) that the President's Proclamation (No. 2974) of April 28, 1952, 66 Stat. C31, declared the termination of the emergency proclaimed on May 27, 1941. The trial court so held (R. 37-44) and appropriate findings of fact and conclusions of law were filed (R. 44-47).³ Ac-

² In a prior suit, the appellant attempted to obtain reformation of the lease here involved to recover for the alleged reasonable value of the use and occupancy of the premises since August 14, 1945, upon which date he alleged the lease terminated. The district court found that that action was barred by the statute of limitations and dismissed the suit for want of jurisdiction over the United States. This Court affirmed. *Werner v. United States*, 188 F. 2d 266 (1951).

³ At the hearing appellant did not attempt to prove any basis for the allegations contained in his amended complaint to show the national emergency had been brought to an end but, instead, con-

cordingly, judgment was entered awarding appellant \$183.15, the rent due from June 30, 1945, to October 28, 1952, six months after termination of that emergency (R. 48-49). (This rent had previously been tendered by the United States and refused by appellant (R. 46-47).)

ARGUMENT

The district court correctly held that there was a valid and subsisting lease until October 28, 1952

By express provision of the lease in question, the termination of the unlimited emergency as declared by the President on May 27, 1941, determines the termination of the lease (R. 15, 22). The emergency so proclaimed by the 1941 proclamation was terminated by Proclamation 2974 of April 28, 1952, and thus the lease under its terms expired October 28, 1952. That the national emergency did not terminate, for purposes such as are here involved, until April 28, 1952, has been judicially determined. *American Houses v. Schneider*, 211 F. 2d 881, 884 (C. A. 3, 1954). See also 40 Op. A. G. 421, 423 (1945). In the *American Houses* case, with reference to what a 1943 lease described as "the present national emergency," the court stated (211 F. 2d at p. 884): "* * * we are satisfied that the court correctly concluded that 'the present national emergency' described in the lease is to be treated as expiring on April 29, 1952, by virtue of Presidential Proclamation No. 2974, issued the preceding day."

tended the national emergency was terminated by the Joint Resolution of Congress dated July 25, 1947, 61 Stat. 449, 451 (R. 39-40).

Appellant's sole contention is that the emergency announced on May 27, 1941, terminated on July 25, 1947.⁴ This contention is based on section 3 of the Joint Resolution, 61 Stat. 451, approved that day by the President. Appellant's argument seems to be that the lease was negotiated pursuant to the Act of July 2, 1917, 40 Stat. 241, as amended, 50 U. S. C., sec. 171, a statute enumerated in the Joint Resolution, and that in consequence the emergency proclaimed on May 27, 1941, *and* the lease were terminated by approval of the Joint Resolution.

The contention is frivolous. Appellant cites no authority and offers no argument, save mere assertion, for its proposition that the lease in question must be taken as authorized only by 50 U. S. C., sec. 171. That contention, if accepted, would be applicable to every lease which did not in terms state that it was negotiated pursuant to some authority, other than section 171. Congress could hardly have intended such a result, since Congress has by legislation subsequent to the 1947 Joint Resolution recognized the continu-

⁴ While this Court held in No. 13167 (*Werner v. United States*, 198 F. 2d 882, 883 (1952)) that its earlier holding in No. 12612 (*Werner v. United States*, 188 F. 2d 266, 267 (1951)) that "There has been no 'termination of the unlimited national emergency' declared by President Roosevelt on May 27, 1941, by Proclamation 2487" was not "*res judicata* (perhaps more properly estoppel by judgment)" of the instant action, it is submitted that under the doctrine of *Chicot County Dist. v. Bank*, 308 U. S. 371, 378 (1940), so far as appellant's present sole argument is concerned, i. e., that the Joint Resolution of Congress dated July 25, 1947, 61 Stat. 449, had the effect of terminating the lease in question, the judgment of this Court in No. 12612, *supra*, must properly be considered *res judicata*.

ance of the emergency for such purposes as the Government acquired its lease in this case, and has continued to extend the life of the legislation authorizing such contracts.⁵

Moreover, appellant's apparent position in any event rests upon a complete misconception of the purpose, meaning, and effect of section 3 of the Joint Resolution.

Section 3 provides that:

*In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941.*⁶

Among "the following statutory provisions" is the Act of July 2, 1917, 40 Stat. 241, as amended, 50 U. S. C., sec. 171. That Act contains a proviso, 40 Stat. 241:

That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of

⁵ Thus, as the trial court found (Fdg. 6, R. 47), at all times here involved prior to April 28, 1952, there was valid statutory authority for leasing the property other than 50 U. S. C., sec. 171. Under the provisions of section 1 (a) of the Act of July 2, 1940, c. 508, 54 Stat. 712, 50 U. S. C. Appendix, sec. 1171, the Secretary of War, now the Secretary of the Army, was expressly authorized to provide for the storage of munitions and supplies and to enter into contracts for those and other military purposes. That section was in effect throughout the period involved. Act of April 14, 1952, c. 204, 66 Stat. 54, 55; Act of July 3, 1952, c. 570, 66 Stat. 330, 331; Act of March 31, 1953, c. 13, 67 Stat. 18; Act of June 30, 1953, c. 172, 67 Stat. 131, 132.

⁶ All emphasis has been supplied.

any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency.

In short, section 3 of the Joint Resolution prohibited use of the procedures set out in the proviso of the Act of July 2, 1917, after July 25, 1947, the date on which it became effective. In fact, it has been expressly held in a somewhat similiar situation, in which the Court rejected the proposition asserted here, that by that Joint Resolution Congress "was not terminating the national emergency as defined in leases or condemnation petitions by which the land on which the projects were located were acquired * * *." *United States v. Certain Parcels of Land, Etc.*, 102 F. Supp. 691, 695 (W. D. Pa. 1952).

While it is believed that the foregoing makes resort to legislative history unnecessary, those materials support the view that section 3 of the Joint Resolution of July 25, 1947, suspended the enumerated statutes as to further acquisitions thereunder and had no

reference to the termination of interests theretofore validly acquired. U. S. Code Congressional Service, 80th Congress, First Session, 1947, pp. 1360-1361, 1368. As shown at the last cited page, the Senate Report recognized that the Joint Resolution simply suspended the statute in question. Thus the Committee said (*Ibid.*, p. 1368):

31. Authority to take immediate possession of land needed for military purposes at the commencement of condemnation proceedings "in time of war or the imminence thereof."

July 2, 1917 (40 Stat. 241, ch. 35), extended April 11, 1918 (40 Stat. 518, ch. 51), to nitrate plants, etc.; and July 9, 1918 (40 Stat. 888), to timber, etc.

Terminated. The authority under this statute is lapsed by the resolution, but the statute remains as permanent legislation.

In further confirmation of the purpose of section 3 is the statement made by the President on the occasion of his approval of the Joint Resolution. He said: "The emergencies declared by the President on September 8, 1939, and May 27, 1941, and the state of war continue to exist, however, and it is not possible at this time to provide for terminating all war and emergency power." See *Woods v. Miller Co.*, 333 U. S. at p. 140, fn. 3. Moreover, in the Act of April 14, 1952, 66 Stat. 54, extending the life of 50 U. S. C., sec. 1171 (see fn. 5, p. 6, *supra*), Congress spoke of the "termination hereafter" of the national emergency declared by the Proclamation of May 27,

1941. This was years after appellant claims the emergency had ended.⁷

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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DECEMBER 1954.

⁷ It is unnecessary to deal with appellant's argument (Br. 20-23) that the trial court erred in holding that only the President could terminate the emergency. Since Congress did not by the Joint Resolution of 1947 terminate the emergency, the *result* reached by the trial court is correct and should not be disturbed even if the court's reasoning be assumed to be imperfect. E. g., *Brown v. Allen*, 344 U. S. 443, 459 (1953).

No. 14,417

IN THE
United States
Court of Appeals
For the Ninth Circuit

C. W. CAYWOOD,

Appellant

VS.

UNITED STATES OF AMERICA,

Appellee

Appellant's Opening Brief
Appeal from the United States District Court
for the District of Arizona

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Appellant's Opening Brief

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JURISDICTIONAL MATTERS

On March 11, 1954 in the United States District Court for the the District of Arizona, Honorable Claude McColloch, Judge, presiding, the appellant C. W. Caywood and his co-defendant Harry Tompkins were found by a jury guilty of violating 18 U.S.C., Sec. 371 (Conspiracy) (T.R. 40). On March 15, 1954 the court entered an order that appellant be allowed until March 23, 1954 to file motions for a new trial and in arrest of judgment (T.R. 63). The motions were filed on March 17, 1954 (T.R. 66, 67), were denied on March 24, 1954 (T.R. 68) and on April 12, 1954 the court entered its judgment and commitment (T.R. 70). On the same day, Caywood filed a Notice of Appeal (T.R. 71).

The District Court had jurisdiction under 18 U.S.C. Section 3231. This Court has jurisdiction under 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

On January 18, 1954 a grand jury returned an indictment¹ charging that the appellant and his co-defendant Harry Tompkins conspired² "(1) to commit offenses against the United States of America, and (2) to defraud the United States of America and certain agencies thereof, in that said defendants conspired to violate 18 U.S.C.A. Sec. 1001³ * * *". (T.R. 3).

Viewing the evidence in a light most favorable to the government, the facts are these.

The State of Arizona was receiving goods and materials from various agencies of the United States (such as the Navy, Army and Federal Security Agency) under 40 U.S.C.

1. The indictment as returned and the indictment which was considered by the jury in its deliberations was not the same, the clerk on the Court's order having lined out portions of it (T.R. 438). The lined-out portions are not printed in the Transcript of Record.

2. The conspiracy statute, 18 U.S.C. Sec. 371 reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

3. Title 18 U.S.C. Sec. 1001 reads: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Sec. 484 (j) (1) which provides in part that "Under such regulations as he may prescribe, the Administrator [of General Services] is authorized in his discretion to donate for educational purposes or public health purposes, including research, in the States, Territories, and possessions without cost (except for costs of care and handling) such equipment, materials, books, or other supplies under the control of any executive agency as shall have been determined to be surplus property and which shall have been determined * * * to be usable and necessary for educational purposes or public health purposes, including research."

The Arizona State Department of Education was eligible to receive such surplus property (T.R. 84, 88). The appellant from January 24, 1949 to January 25, 1951 was Assistant Superintendent of Public Instruction for Arizona (T.R. 146) and as such could sign requisitions for surplus property for the Arizona Educational Agency for Surplus Property (T.R. 113, 114). That Agency was to distribute the property to schools, but a Field Representative in the United States Office of Education in charge of donations (T.R. 87), in answer to the question "Now you advised him (the appellant) that if he couldn't get rid of this property to sell it, isn't that correct?" Testified, "Well, I might have, yes." (T.R. 108).

The requisitions were known as DP-2 Forms (see T.R. 92, 94 for examples). Among other matters they contained the following:

"The applicant (the State Educational Agency for Surplus Property) hereby certifies that: 1. the applicant is an educational activity operated by a State * * * 2. the property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization." (T.R. 92).⁴

4. The language varied in other DP-2 Forms, but not in any material respect (see T.R. 94).

Some of the property which was shipped to Arizona by virtue of five DP-2 Forms bearing the appellant's name was not distributed to eligible educational institutions for educational purposes. It was ultimately converted by the defendant Tompkins for his and allegedly, the appellant's own use. The property was shipped to Arizona on the receipt by the proper United States officials of those five DP-2 Forms and consisted of a Quickway truck mounted crane (T.R. 197), three Harvester Company tractors (T.R. 176), a Northwest Shovel (T.R. 150), spare parts for a Caterpillar tractor (T.R. 185), and a generating set with tire vulcanizing equipment (T.R. 102), as described in the overt acts set forth in the indictment (T.R. 6 et seq.). When this property arrived in Arizona some of it was taken from the railroad yards in Phoenix to a ranch belonging to or occupied by the defendant Tompkins (T.R. 200). Some was taken from Florence, Arizona and on instructions from Tompkins was then delivered to a private concern in Phoenix (T.R. 245). Ultimately, it all went into the hands of private concerns who paid Tompkins for it (e.g., T.R. 309). Tompkins left the money (or at least some of it) with his attorney who deposited it in his, the attorney's, trust account for the credit of Tompkins (T.R. 332).

During this period, and while the appellant was with the Arizona Educational Department, he was also engaged quite extensively at various places in buying and selling all kinds of equipment and bidding for it at public auctions (T.R. 361, 362). The evidence on the part of the government to "tie" the appellant's activities in with Tompkins' consists of the following: An employee of the Arizona State Educational Agency was instructed by appellant to unload a Motor Crane from a railroad car. The following day the crane was unloaded and taken to Tompkins' ranch (T.R.

201). When asked who told him to take the crane to the ranch, the truck driver said "I guess Mr. Caywood did," but couldn't swear to it; it might have been Bruce Smith (also with the Agency) or anyone else in authority (T.R. 210). There was also evidence that on one occasion Caywood was seen with Tompkins at the ranch by a witness who was interested in buying equipment (T.R. 218, 219) and on another occasion at a junkyard in Phoenix (T.R. 229). The witness also saw Caywood and Tompkins together in Florence, Arizona and Caywood told the witness that if the latter would give him a list of equipment he desired Caywood would try to get it. (T.R. 222).

Tompkins' attorney testified that he gave a check to Caywood from Tompkins' account (T.R. 345) and some cash because Tompkins said Caywood would not accept another check (T.R. 350). Another witness testified that he compiled figures for Tompkins' attorney showing that Tompkins had paid Caywood about \$10,000. In arriving at this figure the bookkeeper considered amounts paid to Tompkins by the State Tractor Company (T.R. 368). The State Tractor Company had bought some of the surplus equipment from Tompkins and had repaired some for him (T.R. 269 et seq.).

When the evidence was all in, the court struck from the indictment charges that the defendants were guilty of substantive crimes of embezzlement; for the court found that the surplus property coming to Arizona had ceased to belong to the United States (T.R. 445).

The case was submitted to a jury which returned a verdict of guilty.

Other facts appear in the argument.

THE QUESTIONS INVOLVED

The questions involved on this appeal are: (1) Was the prosecution barred by the statute of limitations? This is

considered under the argument relating to Specification of Error No. I. (2) Did the court err in giving and failing to give certain instructions? The balance of the argument deals with this question. As the instructions must be considered as a whole, for the convenience of the court they are set out in their entirety in an appendix to this brief.

SPECIFICATION OF ERROR NO. I

The prosecution was barred by the statute of limitations and the court erred in refusing to dismiss the indictment.

SPECIFICATION OF ERROR NO. II

The court erred in refusing to give the following instruction (T.R. 62) :

“At various times during my instructions, I have indicated that knowledge on the part of the accused is an indispensable element. I charge you that there is no duty whatsoever on an accused to prove that he had no such knowledge, because the burden of proof is upon the prosecution to prove beyond a reasonable doubt that the accused had the requisite knowledge.”

The objection was raised thus (T.R. 447) :

“Mr. Ironside: Turning now to objections coming to instructions requested * * * 30 (T.R. 62), previously the court had indicated (T.R. 434) on the submission of these instructions prior to summation that the substance of each of these instructions would be given.

The charge, as given to the jury, did not include the substance of these requested instructions were pertinent and necessary on each of the propositions of law indicated in order that the jury might understand properly and relate properly the fact to the appropriate law * * *”.

“Mr. Clark: I join in the exceptions * * *”.

SPECIFICATION OF ERROR NO. III

The court erred in refusing to give the following instruction (T.R. 59) :

“At various times during my instructions, I have indicated that knowledge and a particular specific intent are both indispensable elements of the offense alleged. I charge you that if an accused does not have such knowledge, such particular specific intent cannot exist. To establish such particular specific intent, the evidence must be clear and certain and establish beyond a reasonable doubt that the accused had such knowledge. If the evidence as to such knowledge is not clear and certain, or if the evidence of such knowledge is uncertain or equivocal or ambiguous or doubtful, then I charge you such evidence would not establish that the accused had such knowledge or such particular specific interest.”

The objection was raised thus (T.R. 447) :

“Mr. Ironside: Now referring to Instruction No. 24 (T.R. 59), which the court considered and declined to charge and the charge did not cover, as an independent and separate objection to each of the failures to charge each and all of those matters. The grounds are these :

That the proposition is on the fact and on the matters in evidence. Each of those instructions state a proposition at law which is germane to the issues and is essential for a jury to be thus instructed in order that they may have a proper grasp and understanding of the fact and to understand in what relation to the charge those facts have held significance and held efficacy.”

“Mr. Clark: I join in the exceptions * * *”.

SPECIFICATION OF ERROR NO. IV

The lower court erred in giving the following instruction (T.R. 441) :

“Any improper interference with the United States Government in the discharge of its activities is deemed to be a fraud on the government. In other words, here the United States by statute was trying to do something for the Arizona schools and officials were trying to carry out their sworn duty to effectuate the object of the statutes. But that their functioning under that statute was interfered with improperly by Defendant Caywood and collaborated in by the other Defendant. In that they were not able to carry out that function that is the scheme or fraud on the Government.”

The instruction is so erroneous and so prejudicial that it requires reversal per se. Objection was urged thusly (T.R. 448):

“Mr. Ironside: More specifically on those instructions, and I especially relate to those that have to do with the falsity of the statements, the DP-2 forms, the charge of the Court did not encompass all of the predicates upon which the facts are to be applied to determine legally not only the falsity but the connection of the falsity to the Defendant Tompkins and the same is true in connection with the Court’s charge on the conspiracy itself and on the agreement * * *

“Mr. Clark: I join in the exceptions which Mr. Ironside has made.”

SPECIFICATION OF ERROR NO. V

The court erred in its instructions to the jury in failing to read or explain the substance of 18 U.S.C., Sec. 1001, the statute which the defendants were charged with conspiring to violate. The error is so obvious and so prejudicial that this court will notice it.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. 1

On a Conspiracy Charge, the Statute of Limitations Begins to Run From the Last Overt Act. Acts Done After the Object of the Conspiracy Has Been Accomplished Are Not Overt Acts.

The statute of limitations applicable to this case is three years.⁵ The appellant moved that the indictment be dismissed on the ground that it was barred by the statute (T.R. 18). The motion was denied (T.R. 29). The motion was renewed at the close of the evidence and was again denied (T.R. 433).

The pertinent dates to be considered are these: The indictment was returned on January 18, 1954 (T.R. 16). The last DP-2 Forms which allegedly contained false claims were filed by the appellant on June 28, 1950 (See "Overt Acts" 5, 9, and 13; T.R. 7, 8, and 9). All the so-called "Overt Acts" set forth in the indictment which were performed subsequent to the critical date of January 18, 1951 (i.e., three years prior to the date of the indictment) consisted of sales by Tompkins and receipt of the sales price. (See "Overt Acts" 11, 12, 15, 16, 31, 32, 33, 34, 35, 38 and 39; T.R. 8-10, 13-16.)

The statute of limitations begins to run from the last overt act done to effect the object of the conspiracy. *Fiswick v. United States* (1946), 329 U.S. 211, 91 L. Ed. 196, 67 S. Ct. 224. Acts done after the object of the conspiracy is accomplished are not overt acts from the standpoint of the running of the statute. The applicable rule of law is thus stated in 15 C.J.S., *Conspiracy* Sec. 43, p. 1068:

5. Title 18 U.S.C. Sec. 3282 reads: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

“The overt act must be a subsequent independent act following the conspiracy, and done to carry into effect the object thereof, *and cannot succeed the completion of the contemplated crime.*” (Italics added).

The indictment charges that the defendants conspired to commit offenses against the United States. The offenses were to knowingly and wilfully make false and fraudulent representations in matters within the jurisdiction of agencies of the United States, in violation of 18 U.S.C. Sec. 1001. The elements of a conspiracy under such an indictment are first, the agreement of the parties to commit a substantive crime or crimes; and second, an overt act to effect the object of the conspiracy. *United States v. Falcone* (1940), 311 U.S. 205, 85 L. Ed. 128, 61 S.Ct. 204. Although the overt act need not be the commission of the substantive crime, it may be. *United States v. Offutt*, 1942, 75 App. D.C. 344, 127 F.2d 336; *Baugh v. United States*, 9 Cir., 1928, 27 F.2d 257. In the indictment in the case at bar, the violations of 18 U.S.C. Sec. 1001 (i.e., filing the DP-2 Forms) are overt acts. Consequently, when the last violation was accomplished, the conspiracy succeeded and the statute began to run. See *Huff v. United States*, 5 Cir., 1951, 192 F. 2d 911.

To express it in another way, the indictment charges that the defendants conspired to present false claims to the government. Pursuant to the agreement, they presented such false claims, the last one on June 28, 1950. The object of the conspiracy was thus effected on that day and the period of limitations commenced. Because the defendants might later reap the benefit of their conspiracy, or because they may do acts to realize the fruits of their crime, does not again start the statutes to run; for, what happens after a conspiracy is finally accomplished is to be

regarded as a result of the conspiracy, not a part of it. So, it is said in *Hall v. United States*, 10 Cir., 1940, 109 F.2d 976, 984:

“The overt act must be a subsequent independent act following the conspiracy and done to carry into effect the object thereof, and cannot succeed the completion of the contemplated crime.”

A concrete example of the principle is found in *United States v. Black*, 7 Cir., 1908, 160 F. 431 affirming *Ex Parte Black*, D.C. Wis., 1906, 147 F. 832.⁶ There the defendants were indicted for conspiring (under the old section 88) to defraud the United States of title to public lands by making false entries. The scheme was this: the defendant Parker offered to pay the other defendants a sum of money if they would make fraudulent entries on the lands and when they received title to transfer them to him and others. This they did by filing false affidavits, securing from the government certificates of purchase and assigning them to Parker. The certificates of purchase were issued more than three years prior to the return of the indictment; but within the three-year period Parker paid the other defendants for their illegal acts. The court held that the object of the conspiracy was to illegally acquire the certificates of purchase; and when acquired (or when the false affidavits making possible the acquisition were filed) the object of the conspiracy was accomplished and subsequent acts, such as paying off the co-conspirators, could not logically be considered as effectuating the completed crime. Said the court:

“Whatever may appear from the indictment as the relation of these payments and of the payees to the alleged conspiracy, the proof of the fact and date of

6. A part of the lower court's opinion may not express the law as it is now. But it is submitted that in regard to the point under discussion here, the decision is correct.

completion of entries and issuance of certificates of purchase establishes beyond controversy that each payment was made not as 'an act to effect the object of the conspiracy; nor to procure services to that end, but in settlement or payment for a pre-existing service or obligation * * *".

The lower court said:

"An overt act presupposes a pending conspiracy * * * It is a contradiction of terms to speak of an act done to effect the purpose of the conspiracy after the conspiracy has been accomplished."

In accord is *Lonabaugh v. United States*, 8 Cir., 1910, 179 F. 476. And in *United States v. Ehrgott*, C.C.S.D. N.Y., 1910, 182 F. 267 the judge said that an overt act cannot succeed the completion of the contemplated crime. In *De Luca v. United States*, 2 Cir., 1924, 299 F. 741, the defendants were charged with a conspiracy to defraud the United States by removal of opium from a bonded warehouse without payment of the duty thereon. The court said:

"As the trial progressed, it was argued by the defendant in error that the sale of the opium to some Chinaman was an overt act in furtherance of the conspiracy. * * * However, the overt act must be one which tends to further the conspiracy. If not, it is not an overt act, no matter what it may be called. * * * The object of the conspiracy charge was obtained as soon as the opium was out of the bonded warehouse * * * No act can further the conspiracy which transpires after the end of the conspiracy."

In *Rose v. St. Clair*, D.C. Va., 1928, 28 F.2d 189 the defendants were indicted for conspiring to deposit films of prize fights in the mails in violation of the Act of July 31, 1912, C. 263, 18 U.S.C. Sec. 405. The question before the

court was whether or not the public exhibition of the films after being shipped in interstate commerce constituted an overt act. The court said:

"In the affidavit the 'object of the conspiracy,' within the meaning of the conspiracy statute, is confused with what may be conveniently called the ultimate purpose of the conspirators. The object of the conspiracy was to violate section 1 of the act of 1912; the ultimate purpose of the conspirators was to publicly exhibit the films in Virginia; and this clear and unavoidable distinction makes necessary the conclusion that the object of the conspiracy had been fully and completely effected when the interstate transportation of the films had been completed. It also follows that the subsequent exhibition of the films in this city, while it was an act done to effect the ultimate purpose of the conspirators, could not have been an act done 'to effect the object of the conspiracy.' When the object of a conspiracy has been fully accomplished, no act subsequently done can possibly be an act done to effect the object of the conspiracy. To speak of an act done after the object in view has been fully accomplished as an act done to effect such object is an absurdity."

Cf. *State v. Gregory* (1919), 93 N.J. Law 205, 107 A. 459.

The foregoing argument is equally applicable to a conspiracy to violate 18 U.S.C. Sec. 1001 and to a conspiracy to defraud the United States; for even under the latter, the last overt act would occur when the last piece of equipment acquired in pursuance to the conspiracy was converted to the defendants' use.⁷ *Bellande v. United States*, 5 Cir., 1928,

7. The equipment which was sold within the three year period prior to the time the indictment was returned had long before been converted to Tompkins' use. The two tractors referred to in Overt Acts 12 and 16 (T.R. 9, 10) had been hauled on Tompkins' instructions from Florence to Phoenix, Arizona and put in a plant by

25 F.2d 1. But whether there is a distinction between the two conspiracies is a moot question under *Bridges v. United States* (1953), 346 U.S. 209, 73 S. Ct. 1055, 97 L. Ed. 1557. There the court said:

“The Government contends that the General Conspiracy Act under which Count I is laid comprises two classes of conspiracies: (1) ‘to commit any offense against the United States’ and (2) ‘to defraud the United States in any manner or for any purpose’. It urges that the indictment here charges a conspiracy to defraud the United States under the second clause. It suggests that, under that clause, proof of a specific intent to defraud is an essential ingredient of the offense and thus brings Count I within the Suspension Act. The fallacy in that argument is that, while the indictment may be framed in the language of the second clause, both it and the proof to support it rely solely on the fact of a conspiracy to commit the substantive offenses violating Sec. 346 (a) (1) or Sec. 346 (a) (5) [Nationality Act of 1940] as charged in Counts II and III. Count I actually charges that petitioner conspired to ‘defraud the United States’ only by causing the commission of the identical offenses charged in Counts II and III. The use in Count I of language copied from the second clause of the conspiracy statute merely cloaks a factual charge of conspiring to cause, or knowingly to aid, Bridges to make a false statement under oath in his naturalization proceeding, or to obtain by false statements a Certificate of Naturalization to which he was not entitled.”

Tompkins for repairs which were charged to Tompkins, prior to September, 1950 when he asserted ownership of them (T.R. 246, et seq.). The tractor spare parts and the vulcanizing equipment and material referred to in Overt Acts 30 and 38 (T.R. 13, 15) were taken to Tompkins' ranch in 1949 (T.R. 218) where he tried to sell them in the year 1950 (T.R. 212, 214) and did sell some in that year (T.R. 217) and in that year engaged one McClintock to sell the rest for him on a commission basis (T.R. 302, 304). Certainly these were acts of conversion.

To conclude this portion of the argument: the alleged conspiracy was to file false claims; the false claims were all filed prior to June 29, 1950; therefore, the conspiracy was ended. It follows that the indictment was returned more than three years after the last overt act and its prosecution was therefore barred.

ARGUMENT IN SUPPORT OF SPECIFICATIONS OF ERROR NOS. II AND III

It Is Error for the Court to Fail to Instruct the Jury that Wrongful Intent Is an Element of Conspiracy and Must Be Established in Order for the Jury to Find Defendants Guilty.

The court in charging the jury gave no instructions relating to intent or knowledge. These matters, of course, are indispensable elements of conspiracy. *Mazurosky v. United States*, 9 Cir. 1939, 100 F.2d 958. The following taken from 15 C.J.S., *Conspiracy*, Sec. 45, p. 1071 is supported by numerous authorities:

“To render the formation of a common design a criminal conspiracy, there must be a corrupt motive or intent, generally inferable whenever the means used are such as would ordinarily result in the commission of an unlawful act. * * * To constitute the criminal intent necessary to establish a conspiracy to commit an act prohibited by statute, there must be both knowledge of the existence of the law and knowledge of its actual or intended violation. Guilty knowledge of the act done by the conspirators or of the facts, the existence of which is essential to consummate the conspiracy, is a necessary element of the offense * * *”.

Judge McCulloch in his well-framed instructions reported in *United States v. Belisle*, D.C. Wash., 1951, 107 F. Supp. 283 recognized this emphatically. In a detailed explanation of the requirement of specific criminal intent, he said among other things:

"In connection with this kind of a charge, the Government must prove the act here of conspiracy, and that it is the sort alleged; more, it must prove that it was done and entered into with criminal intent, with specific criminal intent. * * * You have got to be doing something with a bad motive, with a bad heart. * * * You cannot find these defendants guilty unless you find, in addition to the conspiracy, if one existed, they did what they were doing, knowing it was wrong, and with specific intent to defraud the Government."

But in the same judge's instructions in the case at bar he did not mention a single word in reference to *mens rea*.

In *Morissette v. United States* (1951), 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288, which Judge McCulloch described as "classic in the American Federal field," the court said:

"Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."

And, according to the *Morissette Case*, it must be submitted to the jury however clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention. "Juries are not bound by what seems inescapable logic to judges."

The requested instructions relating to knowledge and intent are set out totidem verbis in Specifications of Errors Nos. II and III, *supra*. They assume that the court would instruct on this essential. (For example, the requested instruction quoted in Specification of Error No. III begins: "at various times during my instructions, I have indicated that knowledge and a particular specific intent are both indispensable elements of the offense alleged."). The balance of the desired instructions correctly state the law. They are "stock" instructions applicable to the case at bar; and

because they are accurate it is felt that there is no necessity to discuss them further. The lower court properly did not reject them because it believed them erroneous, for counsel were told that the instruction set forth in Specification of Error No. II would be given (T.R. 434) ; however, it was not, even in substance, although the failure to give it was brought to the court's attention (T.R. 447).

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. IV

An Instruction that "Any Improper Interference with the United States Government in the Discharge of Its Activities Is Deemed to Be a Fraud on the Government" Is Erroneous and Is Prejudicial Particularly Where the Court Does Not Instruct the Jury that in Order to Constitute Fraud There Must Be Some Evil or Dishonest or Wrongful Intent.

More serious even than failing to instruct on criminal intent, the court actually inferred to the jury that it was not necessary that criminal intent be established. This point is made evident by the instruction set forth in Specification of Error No. IV, wherein the court instructed that "Any improper interference with the United States government in the discharge of its activities is deemed to be a fraud on the Government." Such is not the law. In order to commit a fraud upon the government there must be at least a knowing, intentional wrongdoing. So, in *Hammerschmidt v. United States* (1924), 265 U.S. 182, 44 S. Ct. 511, 68 L. Ed. 968, it is said

"To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be

defeated by misrepresentation, chicanery, or the over-reaching of those charged with carrying out the governmental intention."

Under this rule a mere improper interference is not sufficient to constitute fraud. The interference at least must be by dishonest means. *Braatlien v. United States*, 8 Cir., 1945, 147 F.2d 889.

The word "improper" as it is commonly used and as it would be understood by a jury negates unlawfulness or intentional wrongdoing. Webster's New Collegiate Dictionary defines it as:

"not proper; *a.* not appropriate, fit or congruous; * * *
b. not accordant with fact, truth, or right procedure; incorrect; inaccurate."

Bouvier's Law Dictionary (Baldwin Ed. 1934) gives this definition: "not suitable; unfit; not suited to the character, time, and place. Improper conduct is such as a man of ordinary and reasonable care and prudence under the circumstances would have been guilty of." Ballentine Law Dictionary, 2 Ed. is substantially the same.

One can think of numerous acts that a person can perform which improperly interfere with the functions of the government. But it goes without saying that they do not constitute a fraud unless they have the element of intentional wrongdoing.

Nowhere in the instructions were the jury told that in order to find a verdict of guilty it was necessary for them to believe beyond a reasonable doubt that the defendants conspired⁸ to do an intentional wrong. The matter is of

8. Even in regard to carrying the burden of proof in establishing the conspiracy, the court erroneously instructed (T.R. 442): "* * * If you find beyond a reasonable doubt [that] the circumstances indicate there was such an agreement between these parties, it will be your duty to find them guilty."

extreme importance, for the liberty of the appellant is at stake; and it is sincerely believed that if the court had properly instructed the jury it would have returned a verdict of not guilty; for it is inconceivable that the jury ever would have concluded that prior to the appellant's filing the particular DP-2 Forms which are involved in this case—or any other DP-2 Forms—that he and Tompkins had agreed that those DP-2 Forms would be false because they intended to divert the property called for from the schools. The jury probably felt that “something was improper” in the appellant's activities. But that is not sufficient on which to base guilt. The appellant could only be tried on the charges made against him by the indictment; not for some supposed crime, which in the untrained minds of the jurors may have been imagined.⁹

It is again strenuously urged that the error is so prejudicial that it requires a reversal.

9. An isolated paragraph in the indictment (T.R. 5) charges that the defendants conspired to defraud the government by depriving it of its right to dispose of its surplus property according to law and conspired to defraud it by preventing its distribution to eligible educational institutions and conspired to defraud the government by converting its donable surplus property from such institutions to the defendants' own and others' use. The paragraph must be read with the whole indictment, as it is merely explanatory of the charge of conspiracy to violate 18 U.S.C. Sec. 1001 (see Bill of Particulars, T.R. 30). It could not be treated as a separate indictment, for alone it states no time when the alleged offense was committed, no place where it was committed, does not describe the agencies defrauded, nor the property converted, does not allege the acts were done “knowingly, wilfully, unlawfully,” etc. See *Asgill v. United States*, 4 Cir., 1932, 60 F.2d 780.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. V

Failure of the Court to Define to the Jury the Substantive Offense Which Defendants Are Charged with Conspiring to Violate Is Reversible Error.

As has been said before, the indictment charged the defendants with conspiracy to commit offenses against the United States and to defraud the United States "in that defendants conspired to violate 18 U.S.C. Sec. 1001" (T.R. 3 et seq.). The court did not read Sec. 1001 to the jury when the instructions were given nor did it explain the substance of that statute.

The jury was told in very general terms what the indictment charged the defendants with doing.¹⁰ But the jury was never given the opportunity to consider the evidence in relation to the law because the law was not read nor defined nor explained. The closest to an instruction relating to the substantive crime that the defendants were charged with conspiring to violate is this statement (T.R. 445): "They [the defendants] are on trial for a conspiracy to make false statements and by that means to defraud the government." But it is submitted that that is insufficient to enlighten the jury as to the contents of 18 U.S.C. Sec. 1001. To point out one example of its insufficiency, it omits to tell the jury that the statute requires that the false statement be made "knowingly and willfully."¹¹

10. As will be seen in reading all the instructions, a good part are devoted to what the indictment charged and what the government claimed.

11. Exception was taken because the court refused to give the following instruction (T.R. 60): "Before it can be said that a, or any DP-2 form was a 'false' statement or representation, the burden is upon the prosecution to prove beyond a reasonable doubt that at the time the DP-2 form was filed it was intentionally, deliberately and wilfully untrue, and was then and there known to be thus untrue by the person who filed the DP-2 form." The instruction states good law. *Heindel v. United States*, 6 Cir., 1945, 150 F.2d 492, 497.

The following is the entire opinion of the court in *United States v. Yasbin*, 3 Cir., 1947, 159 F.2d 705:

“An examination of the record in this case discloses that while the trial judge charged the jury as to the elements of the crime of conspiracy he did not instruct them as to the elements of the substantive offense involved in the conspiracy. Consequently the judgment of conviction is reversed on the authority of *United States v. Levy*, 3 Cir., 153 F.2d 995, *United States v. Noble*, 3 Cir., 155 F.2d 315, and *United States v. Max*, 3 Cir., 156 F.2d 13.

Compare *Moyer v. United States*, 9 Cir., 1935, 78 F.2d 624 where the court said that it was the better practice for the court to instruct on the elements of the substantive offense. But in the *Moyer Case* the instructions were detailed enough so that the jury knew what constituted the substantive offense.

The lower court did tell the jury “You will have the Indictment with you in the jury room, as is customary practice” (T.R. 438). But that does not cure the error; for in *Morris v. United States*, 9 Cir. 1946, 156 F.2d 525, 169 A.L.R. 305 it is said:

“In the course of our research we have read decisions upon the point as to whether reference by the judge in his instructions to the information or indictment, which is handed to the jury to take to the jury room, is sufficient information of the offense charged. And the great weight of authority is that such practice is not sufficient. The court must directly and not by reference to a document in the jury’s possession define the offense charged in clear and precise language.”

This court on its own initiative will take cognizance of the fundamental error of failure to instruct on the essential questions of the law involved. *Samuel v. United States*, 9 Cir., 1948, 169 F.2d 787; Annotation in 169 A.L.R. 315.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be reversed.

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(Appendix Follows)

APPENDIX

THE COURT'S INSTRUCTIONS TO THE JURY (T. R. 438 et seq.)

The Court: This case, Ladies and Gentlemen, from the time it was started with the Indictment as the basis for prosecution, has been a conspiracy case. That is to say, these two Defendants were charged with a conspiracy to do something wrong.

I have taken out of the case, because I felt it was my duty to do so, certain of the charges and those have been lined out by the Clerk in the Indictment. So disregard the part that is lined out altogether in whatever attention you give to the Indictment. You will have the Indictment with you in the jury room, as is customary practice. It is not to be considered as evidence, merely a statement of the Government's charge against the Defendants.

Now conspiracy is a combination and agreement by two or more people to do something wrong. In this particular case, the matter has now been reduced to this charge, that these Defendants conspired to defraud the United States Government.

It is charged that they joined together in a mutual enterprise knowingly and criminally and with the full understanding on the part of each other of what they were doing; that they joined together in a scheme to get this Federal surplus property over here to Arizona and make personal use of it. Instead of allowing it to pursue the correct proper course of being distributed to the Arizona schools and school districts, the school system of Arizona.

In other words, that the Defendant Caywood was in an official position as assistant superintendent of public instruction, where he was the authorized officer under the

Arizona laws and was so recognized by the Federal Government, to apply to the various Federal authorities for allocation and shipment over here of various pieces of surplus property. And, of course, it was his duty then, after it got here, to see that it was applied to the uses for which the Federal Government sent it under the Federal statutes over here for educational purposes.

That is what the Federal law said, this type of surplus property could be donated, that meant given free of cost except transportation and handling costs, to the various states for educational purposes.

What the Government claims in this case is that Defendant Caywood joined in a scheme with the other Defendant to get the property on the pretense it was going to be used for those purposes and then, with the other Defendant, used it for their personal purposes.

The Government case hitches around these DP-2 forms. That was the form of application the Government devised for the handling of this surplus property for getting it into the hands of the state and there for distribution to the schools.

The particular false statement which the Government claims was made in these DP-2 forms—I notice their language is different in some of them—but I think this language or something like it is in all of them: “The property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization.”

The Government charges in this case that was a false statement and, knowingly false, that Caywood signed or authorized to be signed, if you find that he did, that statement, knew that wasn't true; he knew he couldn't get the property unless he did sign it; but he knew he didn't intend

to do that. He knew he didn't intend to distribute it or see it was distributed to educational institutions but diverted it for his own profit along with the co-Defendant. That is the Government's charge in this case.

The other co-Defendant was in that scheme with him. The other Co-Defendant's part was to get the money out of the property after it got here. It was Caywood's part to get the property over here and the other Defendant's part to get something out the property after it got here. Later the money to be divided between them. That is the Government's theory in the case.

Now I speak of conspiracy as defrauding the Government. That is the statute under which this indictment is brought. Here is what that means :

Any improper interference with the United States Government in the discharge of its activities is deemed to be a fraud on the Government. In other words, here the United States by statute was trying to do something for the Arizona schools and officials were trying to carry out their sworn duty to effectuate the object of the statutes. But that their functioning under that statute was interfered with improperly by Defendant Caywood and callaborated in by the other Defendant. In that they were not able to carry out that function, that is the scheme or fraud on the Government.

I may say to you here now I have talked with you so far about the Government's theory. In a criminal case, the Defendant does not have to prove himself innocent. The Government has to prove him guilty. That is the way our law works. It has always been so in American history anyway. The Government has the burden of proof when it charges a man a criminal, the burden of proving him guilty.

Every Defendant is presumed to be innocent until proven

guilty beyond a reasonable doubt. That is the burden of proof the Government must satisfy in its charge here for verdict of guilty.

I said conspiracy is a combination of two people in agreement between them. That agreement doesn't have to be proved and can't always be proved by somebody who says "I overheard these people talking here and they made it up to do so and so." Oftentimes the proof has to be circumstantial.

Nobody has come in here nor is there any document to that effect that says Caywood and Tompkins at a certain time got together and worked up a scheme to do what the Government charges. However, there are facts and circumstances here which, if you believe them, you may infer that is what happened.

That is your job. You are triers of the facts, the credibility of the witnesses and the weight and value of the testimony. If you feel from the evidence, even though circumstantial, that these Defendants did have an agreement between them to do what the Government claims has been done here in an effort to subvert the functions of the United States Government in working this property out as to schools and the school system of the state of Arizona; if you find beyond a reasonable doubt the circumstances indicate there was such an agreement between these parties, it will be your duty to find them guilty. If you were not satisfied, it will be your duty to find a verdict of not guilty.

There is one more element in conspiracy under the American law not true in the English law but it is with us. You must not only be in agreement to do a wrong thing but one or more of the parties to the agreement must do some act which we call an overt act to carry it out, effectuate the agreement.

They have a lot of proof here that said certain acts were done, the signing of these DP-2's. If you find Defendant Caywood signed them or authorized them to be signed, that would be an overt act; the unloading of the property out here off the flatcar, hauling it to Tompkins' ranch, if you find that happened, that would be an overt act; selling the property, dividing the money.

You have had proof along all those lines. It is for you to say whether you accept it. But if you do find any things of that nature were done that would satisfy the requirement of overt act in the case.

There must be first the agreement to do this thing we talked about here so much, divert this property from the schools and school system here to their own personal use. First agreement, you have to find that existed beyond a reasonable doubt before you can return a verdict of guilty; second, some act by one or the other of the Defendants to carry out the agreement; likewise find one or more acts of that sort were done beyond a reasonable doubt before returning a verdict of guilty.

In determining whether the Defendants are guilty, here is the form of verdict you will have: We, the jury, duly impaneled and sworn in the above-entitled action, on our oath do find the Defendants as charged in the indictment. You will fill in there, your foreman will when you elect him, what your verdict is, either guilty or not guilty. The two Defendants fall or stand together on the conspiracy charge.

Let me come back briefly to the discussion of conspiracy so that you will have clearly in mind the distinction between the conspiracy charge and the charge that the Defendants did what we call a substantive wrong. I see it is charged here that the Defendants defrauded the Government. By

that I mean kept it from carrying out its statutory functions in distributing this property among the school systems of the state. It is charged they conspired to defraud the Government by making these false applications, that Caywood made them; Tompkins was in on the deal and knew it was going to be done, had to be done, as a matter of fact, to carry out the scheme.

That charge might have been put in a different form. The charge might have been that Caywood filed false statements; that is not what he is charged with; that could have been enlarged that Caywood and Tompkins conspired and agreed that Caywood would file a false statement—no—pardon me, charge could have been made that Caywood made false statements; it could have been enlarged to include Tompkins as an aider and abettor, that Tompkins joined with Caywood to the extent any action on his part was necessary to file false statements. That would be a charge of what we call doing a substantive act.

That is not the way this is set up and these Defendants are not on trial for that. They are on trial for a conspiracy to make false statements and by that means to defraud the Government.

There was a charge in another indictment here that I have taken out of the case that you heard discussed in the opening statements of the case, that these Defendants embezzled this property you heard about here. That is a charge of a substantive act. That was based by the Government on the theory the property still remained the property of the United States Government here in Arizona.

I don't take that view of it. It seemed to me the Government ceased to be the owner of the property and so I dismissed the case as to that part but that would have been a substantive charge; they did something, embezzled the

property; that is out of the case. The trial is not about anything they did, it is about whether they had an agreement. That is what you are to consider. Did these people have an agreement between them? Did they make it up between them to agree, conspire to do these things?

You have to bring into these cases proof of what was done, that follows the agreement, if there was such an agreement. That is not what you are trying, if they did do those things, but to do those things convince you, all taken together, beyond a reasonable doubt, there was prior agreement to do them.

It is your duty to confer and deliberate with each other before arriving at a verdict, also the duty of each juror individually to consider the evidence and instructions. No juror should assent to a verdict he does not conscientiously believe to be a correct one and no juror who after such conferences and deliberations has reached a decision on the facts has a right to surrender his decision to the decision of the majority if he believes his decision is correct. The verdict of the jury must reflect the conscientious judgment of each juror.

You will take these exhibits with you to the jury room, give them the weight you think they are entitled to along with the evidence you have heard from the witness stand.

By any comment I have made on the evidence, I have not intended to indicate to you my opinion as to the guilt or innocence of the Defendants nor as to my belief or disbelief of any particular evidence.

I have only referred to it for the purpose of demonstrating within my acts of making plain to you what the law is that should control you in your consideration of the facts. If I gave you any impression to the contrary, please disregard it. You may retire. Please do not begin your

deliberations until we send you the exhibits. I have a particular reason for asking that. I thank you for your earnest attention. It was rather a long case.

(Whereupon the Jury retired.)

IN THE
United States
Court of Appeals
For the Ninth Circuit

C. W. CAYWOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

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Appellee.

BRIEF OF APPELLEE

Resisting Appeal from the United States District Court
District of Arizona

JURISDICTIONAL MATTER

Appellant in his brief has correctly stated the jurisdictional matters, and Appellee agrees that the District Court had jurisdiction under Title 18 U.S.C., Section 3231, and that this Court has jurisdiction under Title 28 U.S.C., Section 1291.

STATEMENT OF FACTS

The Statement of Facts in Appellant's Opening Brief is substantially correct, but incomplete. Appellee for this reason makes a more detailed statement.

At the outset Appellee does wish, however, to correct one false impression left with the Court. Appellant, on page 3 of his brief, lifts out of context a question put

to the Government witness Simonian, and his answer thereto, namely:

“Q. Now you advised him (the Appellant) that if he could not get rid of this property to sell it?

A. Well, I might have, yes.”

An examination of the record (T.R. 106, 107, 108), discloses that the witness was then testifying and had been testifying in generalities concerning the defendant Caywood and the operations of the state Agency in the State of Arizona, and when the witness was asked the question pertaining to *this property* the reference was not made to the property involved in this case, but to the property stored in the State of Arizona for distribution.

The DP-2 application itself provided:

“If prior to distributing the requested property it is determined that there is no need for all or any part of the property received, this fact will be communicated to the Office of Education, Federal Security Agency, Further, the applicant agrees that if requested he will return at his own expense to the source from which donation was made all property which it does not distribute to be placed in use.

“The property not distributed or reallocated within the state and property which has no further value for educational purposes will be reported to the Field Representative Office of Education, Federal Security Agency.”

The Field Representative of the Office of Education, Government witness Simonian testified on direct examination that he had not at any time authorized the disposal of any of the items with which we are concerned in this case to anyone other than an eligible educational institution, (T.R. 101, 102).

The witness Simonian did testify, however, that he had discussed the disposal of salvage with the defendant Caywood and the witness had advised the defendant Caywood that a sale could be held for salvage in accordance with the procedures in the manual (T.R. 100).

To leave an impression with the Court that the defendant Caywood had been advised by the Government that he could sell the property we are concerned with in this case is to mislead the Court by lifting a question and answer out of context and torture its true meaning.

This case arose out of the administration of Title 40 U.S.C. 484 and essentially paragraph (j)(2) thereof, which concerns the allocation of Government surplus property that is usable and necessary for educational purposes or public health purposes, to eligible donees.

The Appellant C. W. Caywood was one of two defendants tried on two separate indictments which were consolidated for trial. *The other defendant, Harry Tompkins, does not join in this appeal.*

One indictment, identified as No. C-11,424 - Phx. charged the defendants with embezzlement of property of the United States of America in violation of Title 18, U.S.C. 641. At the close of the evidence offered by the Government the Trial Court dismissed this indictment on the motion of the defendants upon the ground that the property in question ceased to be the property of the United States of America (T.R. 415).

The other indictment, identified as No. C-12,219-Phx., charged the defendants with conspiring (Title 18 U.S.C. 371) to violate the laws of the United States by making false statements in violation of Title 18 U.S.C. 1001, and subverting the functions of the Government by depriving the United States of its right to have donable surplus property distributed to eligible educational in-

stitutions in violation of Title 40 U.S.C. 484; and embezzlement of property of the United States in violation of Title 18 U.S.C. 641.

At the close of the evidence offered by the Government the Trial Judge withdrew from the consideration of the jury the portion of the indictment charging the defendants with the embezzlement of Government property (violation of Title 18 U.S.C. 641), and that portion of the indictment was deleted by the Clerk at the direction of the Trial Judge (T.R. 438).

The jury was left to consider, therefore, only indictment No. C-12,219-Phx. and just the portion thereof that charged the defendants with conspiring to defraud the United States in violation of Title 18, U.S.C. 1001 and Title 40, U.S.C. 484.

The defendant C. W. Caywood was Assistant Superintendent of Public Instruction for the State of Arizona from January 24, 1949 (T.R. 87 and Govt. Ex. No. 7) to January 25, 1951 (T.R. 88 and Govt. Ex. No. 8) and was recognized by the Government to be the person responsible for the distribution of surplus property in the State of Arizona. (Govt. Ex. No. 3).

The defendant Harry Tompkins was a Deputy Collector of Internal Revenue for the District of Arizona (T.R. 371).

The United States Office of Education provided a form identified as DP-2 which was used by a state in making application for United States Government surplus property to be used by qualified educational institutions (T.R. 83, 88, 89, 91; Govt. Exs. 1-a, 1-b, 1-c, 1-d and 1-e).

The defendant C. W. Caywood made application on DP-2 forms to the United States Office of Education

in Los Angeles, California (T.R. 98, 113, 115; Govt. Exs. 1-a, 1-b, 1-c, 1-d and 1-e).

Some DP-2 forms bore Caywood's signature, others bore his name placed there by his employees at his direction (T.R. 113, 115, 122, 123, 125 and 129).

The DP-2 forms contained three certifications, two of these we are not concerned with here. The certification we are concerned with appears above the name C. W. Caywood. This is the certification made by the representative of the State Educational Agency and is the middle column found at the bottom of the first page on the DP-2 form (Govt. Exs. 1-a, 1-b, 1-c, 1-d and 1-e) and contains seven representations. We are essentially concerned with the representation found under paragraph 2 which states: "The property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization."

The practice of the Los Angeles field representative of the Office of Education was to send lists of available federal surplus property to the representatives of State Departments of Education (T.R. 88, 108, 109).

When the state determined it had need for any of the property contained in such a list for the schools within the state, the State Department of Education would make an application on the DP-2 form accompanied by a list of the property desired. The field representative of the Office of Education in processing this form would countersign the same for the Government and would then forward the application to the installation, or installations, which had the property applied for by the state. The next step was between the Government installation where the property was located and the state agency in arranging for the moving of the property (T.R. 88, 89).

The state agency was, in effect, the distribution center of surplus property for the schools of the state (T.R. 88, 96 and 97).

The evidence in this case is largely documentary and begins with the DP-2 forms and accompanying papers. The Government Exhibits, numbering 104 in all, traced the equipment applied for by C. W. Caywood into the hands of the persons who purchased it, and traced the money received for said property into the hands of the defendants Caywood and Tompkins.

The Exhibits in this case, except for two, were not reproduced and made a part of the printed transcript of record, for the reason that counsel believed it would be of doubtful assistance to the Court to do so. The Government Exhibits are, however, a part of the Record on Appeal and are available to the Court.

The Government Exhibits are the evidence establishing the 39 overt acts in the indictment and concern the property described there as well as one other item. They trace the property from the Government installations into the State of Arizona and into the hands of purchasers. They also trace the money into the hands of the defendants.

There is no dispute that the property involved was Government property; nor is there any dispute as to the procedures in obtaining the property from the Government. For these reasons much of the evidence in the case need not be dwelt on here.

It is interesting to note in tracing the items of property we are concerned with here that the defendants in many instances used two cloaks to conceal their operations. One is a machinery dealer at Phoenix, Arizona, where most of the equipment was repaired and where most of it was sold. The entree there was through an

uncle of the defendant Tompkins (T.R. 217, 224). The other was a lawyer and brother-in-law of the defendant Tompkins. The latter handled the proceeds of many sales by the maintenance of a special bank account (T.R. 329-365).

Specifically, the property with which we are concerned in this case is: (1) a Quickway Truck Mounted Crane referred to in overt acts 1-4 in the indictment, (2) an International Harvester Tractor referred to in overt acts 5-8, (3) an International Harvester Tractor referred to in overt acts 9-12, (4) An International Harvester Tractor referred to in overt acts 13-16, (5) a Northwest Shovel referred to in overt acts 17-21, (6) a Northwest Shovel referred to in overt acts 22-25, (7) Miscellaneous Tractor Parts referred to in overt acts 26-34, (8) Schramm Generating Set and Vulcanizing Mold referred to in overt acts 36-38, and (9) a Road Grader not alleged in the indictment.

A factual recital of the details pertaining to the acquisition of each of the above pieces of equipment and the disposition thereof would be repetitious, wearisome and of doubtful help to this Court. This is so because the facts in each instance follow a definite pattern. Appellee, therefore, will trace these steps in the body of its brief only so far as the Quickway Truck Mounted Crane referred to in overt acts 1-4 in the indictment is concerned.

This piece of equipment was applied for on DP-2 form (Govt. Ex. 1-e) which has typed upon its face, "This property will be used for maintenance in a school" and accompanying papers. It is further identified in the way bill addressed to the Arizona State Educational Agency for Surplus Property, Govt. Ex. 43-A, and the freight bill was paid for by check signed by

Caywood, Govt. Ex. 11. In Govt. Ex. 11 is a typed memo, "This equipment with the exception of one or two items has already been assigned", and bears the initials, "C.W.C.", which are the defendant Caywood's. The property was unloaded on New Year's Day in 1950 and taken to the defendant Tompkins' ranch (T.R. 208, 209). It was later taken from Tompkins' ranch to State Tractor & Equipment Company (T.R. 257) and was repaired there, Govt. Exs. 57, 58, (T.R. 259). It was sold for the defendants Caywood and Tompkins by a man named Schawver (T.R. 285, 286) and the buyer paid \$5,000.00 for it, final payment being in the form of a check, Govt. Ex. 81 (T.R. 294) and the defendant Tompkins gave him a bill of sale, Govt. Ex. 82. (*The remaining pieces of equipment are traced and set forth in the Appendix, in the event the Court is interested.*)

It is apparent from the evidence as it unfolds that the defendant Caywood did not play an active part in the disposition of the equipment which he had applied for, and had shipped into the State of Arizona. The only instance in which he talked with a proposed buyer was with the Government's witness Haggard, who happened to be an uncle of the defendant Tompkins (T.R. 218).

On one occasion the defendant Caywood told the witness Haggard "to make a list of any stuff I wanted and he would try to get it." (T.R. 222).

Either the defendant Tompkins or the defendant Caywood asked the witness Haggard if he would be interested in selling any of the equipment on a commission basis (T.R. 222).

All of the other contacts with proposed buyers or persons contacted for the sale of the equipment with

which we are concerned in this case were made by the defendant Tompkins. That was the role he was to play in the conspiracy. He also had a ranch which provided a convenient place for the equipment to be stored, and frequent references are made in the Transcript of Record to equipment being at the ranch. A few are T.R. 209, 219, 249, 322.

The defendant Caywood and the defendant Tompkins were frequently seen together at the warehouse where the surplus property was stored. None of their conversations were overheard, because the Government witness Mosher said, "They usually were at the other end of the warehouse where I did not hear what they had to say," (T.R. 143).

The evidence that welds the two defendants inseparably together is the sharing of the proceeds of the sales. The bank account maintained by Z. Simpson Cox (the lawyer brother-in-law of Tompkins) makes it crystal clear. The testimony of Z. Simpson Cox (T.R. 329-367) together with Govt. Ex. 92, which is a photostatic copy of the ledger sheet for the account maintained by him for the defendant Harry C. Tompkins, trace the deposits and the withdrawals in detail. Many of the checks were made to cash, because the defendant Caywood stated he did not wish any further checks (T.R. 350). There were some checks, however, made out to Caywood from this bank account, one of which is Govt. Ex. 94 in the sum of \$1,000.00 which bears the endorsement of C. W. Caywood and was cashed by him (T.R. 345, 347). Another such check is Govt. Ex. 93. This is a check in the sum of \$450.00 deposited to the account of C. F. or Cathryn B. Caywood (T.R. 348, 349).

On one occasion Z. Simpson Cox stated that the defendant Tompkins had explained to him that cash

amounts were being paid to Caywood, and Cox told the defendant Tompkins that he should make payments to Caywood by check to have a record, and that is how the \$1,000.00 and \$450.00 checks came to be made (T.R. 347).

There is no evidence in the case refuting the fact that both defendants participated in the receipts of the sales of the property. Indeed there could not be.

As is not uncommon, wrongdoers frequently have differences of opinion as to the division of the proceeds. That was true in this case.

The Government witness Porter in his testimony discloses that he was hired by Z. Simpson Cox to make a recap on the account; that is how a disclosure came to be made as to the gross amount received by Mr. Tompkins and the gross amount paid to Mr. Caywood; and the defendants accepted his findings (T.R. 367, 373).

Mr. Porter's recollection was that approximately \$10,000.00 had been paid by Mr. Tompkins to Mr. Caywood (T.R. 369). His memory was good as disclosed by Govt. Ex. 104 hereinafter described.

The Government witness Cox testified on cross examination that some time in April, 1951 he had a conversation at the home of the witness Porter, and the defendants Tompkins and Caywood were both present, (T.R. 362, 363). Cox stated that the purpose of the conversation was to determine for income tax purposes what Caywood had received in the way of commissions, and Cox stated that Caywood had received \$10,000.00 from Tompkins, (T.R. 363).

The Government witness Coombs (T.R. 373, 378), a Certified Public Accountant, prepared the amended 1950 income tax return for the defendant Caywood (T.R. 375). He said that in May of 1951 he received

from the defendant Caywood a slip of paper containing some figures which he understood were commissions (T.R. 374, 375) Govt. Ex. 104. It is more than coincidence that the figures set forth in Govt. Ex. 104 tie in perfectly with the Z. Simpson Cox bank account, and to go back to witness Porter, it totals \$10,011.57. Cox confirmed the figures (T.R. 359).

Govt. Ex. 93, the check to C. W. Caywood in the sum of \$450.00, dated August 1, 1950, is set forth in Govt. Ex. 104 on that date and for that amount. Govt. Ex. 94, the check to C. W. Caywood in the sum of \$1,000.00 dated May 13, 1950 falls into the proper place in Govt. Ex. 104. The same is true of the checks which were made to cash. For example, the witness Cox (T.R. 334) described a check in the sum of \$800.00 dated February 18, 1950, Govt. Ex. 97; it heads the list on the correct date in Govt. Ex. 104. The same is true as to Govt. Ex. 96. Govt. Ex. 100 is a check to First National Bank of Arizona dated March 31, 1950 in the sum of \$1,285.25, and Govt. Ex. 101 is a check to Valley National Bank dated March 25, 1950 in the sum of \$742.82—they too appear in Govt. Ex. 104 on the right dates and in the right amounts. The witness Cox endorsed this latter check and got cash for it (T.R. 339). Cox said he talked with Caywood in 1951 about these checks (T.R. 340). Govt. Ex. 95, the check to cash in the sum of \$1,000.00 dated April 8, 1950 finds its proper place and amount in Govt. Ex. 104.

It hardly seems necessary to outline the deposits in the account kept by Cox, but it can be done from his testimony and that of other witnesses. The deposits are in accord with many of the sales we are concerned with here. For example, the \$3,000.00 received by Tompkins for tractor parts from State Tractor & Equipment Company is there (T.R. 332). The State Tractor & Equip-

ment Company check in the sum of \$6,500.00 received by Tompkins for the Northwest Shovel sold to San Xavier Rock & Sand Company (T.R. 344) was deposited there. The check for \$6,875.55 received by Tompkins from Johnson for the tractor which was sold to Mr. Tomison also is deposited there (T.R. 352). Govt. Ex. 76, the check from State Tractor & Equipment Company in the sum of \$1,150.00 given to Tompkins for the road grader (see picture Govt. Ex. 44) is deposited there (T.R. 336). Govt. Ex. 92 (Cox's ledger sheet) binds Caywood to these sales, and Govt. Ex. 104 (Caywood's list of commissions for 1950) is a further confirmation of Caywood's participation and an admission against interest.

ARGUMENT

Appellee assumes appellant has abandoned Points 1, 3, 4, 5 and 8 to 11, both inclusive, contained in his Statement of Points found in the Transcript of Record at pages 458-460, since he has confined his argument in his brief to points 2, 6 and 7 thereof. This Court may disregard the points not argued in appellant's brief. *Forno vs. Coyle*, C.A.A. 9, 75 F. 2d. 692, 695.

In answering appellant's argument we will discuss the Specifications of Error in the order in which they are presented in appellant's brief.

SPECIFICATIONS OF ERROR I

The prosecution was barred by the Statute of Limitations and the Court erred in refusing to dismiss the indictment.

The Government concedes that Title 18 U.S.C. 3282 is the Statute of Limitations that applies to this case, and that the limitation imposed therein is three years from date of the commission of the offense to the date on which the indictment is found.

The Government also concedes the well established rule that in conspiracy the Statute of Limitations begins to run from the last overt act done to effect the object thereof.

Appellant in his brief has failed to correctly state the charge made against the defendants in the indictment. It is found in the Transcript of Record at pages 3 to 16, and in short, says that from April 20, 1949 to the date of the indictment (January 18, 1954) the defendants conspired to commit offenses against the United States of America and defraud the United States of America, and that the statutes violated were 18 U.S.C. 1001 and Public Law 152, 81st Congress (40 U.S.C. 484).

There is but one conspiracy alleged and the object thereof was to thwart the distribution of Government surplus property to eligible schools. The overt acts—39 in all—were to effectuate that object. The ultimate purpose of the conspirators was undoubtedly to obtain money from the sale of the property intended by the Government to be used by eligible schools.

Appellant takes the position that the conspiracy was ended with the filing of the false statements, and since they were all filed more than three years before the indictment was found, the defendant Caywood was saved by the Statute of Limitations.

The difficulty with this premise is that appellant ignores the violation of 40 U.S.C. 484 and the object of the conspiracy. He also ignores overt acts 12, 16, 21, 31, 33, 35 and 39 which were well within three years before the indictment was returned, and appellant is named in all of them.

The conspiracy did not end with the filing of the DP-2 applications as appellant contends, but on the

contrary began with their filing. There were other things done to effect the object of the conspiracy and more than one of them was done within the three year period. All the acts done and performed either in California or Arizona regarding the property we are concerned with here were in furtherance of the object of the conspiracy.

Appellee readily admits the rule taken from *Hall vs. U. S.*, 109 F. 2d. 976, 984, that "The overt act must be a subsequent independent act following the conspiracy and done to carry into effect the object thereof, and cannot succeed the completion of the contemplated crime".

The language in the indictment found in paragraph 2 at page 5 in the Transcript of Record spells out the object of the conspiracy in these words:

"That the defendants, conspired, confederated, and agreed together to defraud the United States of America, and the agencies thereof, by depriving said United States of its right, under the laws and regulations appertaining to the disposal of donable surplus property of the United States to have all of such property disposed of according to the applicable laws and regulations and to defraud the United States by preventing it from distributing its surplus property to eligible educational institutions, and to defraud the United States by diverting and converting its donable surplus property from eligible educational institutions for which allocated to the use of said defendants and others."

When appellant contends, as he does in page 13 of his brief, that under conspiracy to defraud the United States the last overt act would occur when the last piece of equipment acquired in pursuance of the conspiracy was converted to defendants' use, he appears to be thinking in terms of a charge of conversion. That charge was removed from this case (T.R. 415).

The appellant Caywood was very definitely a part of the conspiracy to defeat the operation of 40 U.S.C. 484 and the last acts he performed to that end were to receive money when the property passed into the hands of purchasers (overt acts 29, 31, 33, 35 and 39) rather than to eligible schools as the law intended, "and so long as the partnership in crime continues, the partners act for each other in carrying it forward" *Pinkerton vs. U. S.*, 328 U. S. 640, 646.

The acts performed by Caywood subsequent to the filing of the DP-2 forms were a continuation of the conspiracy. It does not matter that some acts violated one statute and other acts violated another. "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk vs. U. S.*, 249 U. S. 204, at page 210.

Appellee fails to see the application of *Bridges, et al. vs. U. S.*, 346 U. S. 209 to the case at hand. The question presented there was whether the general three year Statute of Limitations was suspended by the Wartime Suspension of Limitations Act in relation to the offenses charged in the indictment.

The Court merely stated that the proof did not support the Government's contention that Count I was in fact a conspiracy to defraud the United States even though language in the indictment was framed in words to that effect.

Appellee submits that the Statement of Facts in this case bears out the charge of defrauding the Government by depriving it of its right to have donable surplus property disposed of in accordance with 40 U.S.C. 484.

SPECIFICATION OF ERROR NOS. II AND III

It is an error for the Court to fail to instruct the jury that wrongful intent is an element of conspiracy and must be established in order for the jury to find defendants guilty.

Appellant contends that the Court failed in its duty to properly instruct the jury as to the elements constituting the crime of conspiracy in that the elements of intent and knowledge were omitted from the Court's instruction. There is ample authority that intent and knowledge are necessary elements of the crime.

U. S. vs. Falcone, 311 U. S. 205

Craig vs. U. S., 9th Cir., 81 F. 2d. 816, 822

Mazurosky vs. U. S., 9th Cir., 100 F. 2d. 958

Marino vs. U. S., (C.C.A. 9th) 91 F. 2d. 691, 696;
certiorari denied 302 U. S. 764

and it was the duty of the Trial Court to properly instruct the jury as to the elements constituting the crime of conspiracy, *Butler vs. U. S.*, 197 F. 2d. 561, 564.

Appellee takes issue with the statement that the Court gave no instructions relating to intent or knowledge. The instructions are found in the Transcript of Record at pages 438 to 446, both inclusive, as well as the Appendix in appellant's brief.

It is not helpful to single out portions of an instruction since they must be construed as a whole. *Benatar vs. U. S.*, 9 Cir. 209 F. 2d. 734; *Graham vs. U. S.*, 120 F. 2d. 543. With this reservation in mind the following paragraphs of the instructions found at pages 439 to 440 T.R. are set out below:

“Now conspiracy is a combination and agreement by two or more people to do something wrong. In this particular case, the matter has now been reduced to this charge, that these defendants conspired to defraud the United States Government.

“It is charged that they joined together in a mutual enterprise knowingly and criminally and with the full understanding on the part of each other of what they were doing; that they joined together in a scheme to get this Federal surplus property over here to Arizona and make personal use of it. Instead of allowing it to pursue the correct proper course of being distributed to the Arizona schools and schools districts, the school system of Arizona.”

This Court in *Craig vs. U. S.*, 81 F. 816, 822 had occasion to go into the subject of knowledge on the part of a conspirator and concluded as did the Court in *Marino vs. U. S.*, *Supra*, 696 that “He must know the purpose of the conspiracy* * *”.

Ordinarily intent will be inferred from the nature of the combination. *Landen vs. U. S.*, 299 F. 75. Further expression to the same effect is found in *Stone vs. U. S.*, 113 F. 2d. 70 at page 75:

“Where guilty knowledge is an element in the offense, as in conspiracy charges and the use of the mails to defraud, the knowledge must be found from the evidence beyond a reasonable doubt, but actual knowledge may be inferred. *Scienter* may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known.”

The Court in *McGregor vs. U. S.*, 134 F. 187, at page 197 gives us further light on intent when it says:

“It is well settled that the law presumes that every man intends the legitimate consequences of his own acts, and that such acts, when knowingly done, cannot be excused on the ground of an innocent intent. In

both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequence of his own acts.”

The Court undoubtedly had this in mind when he instructed:

“In other words, that the defendant Caywood was in an official position as assistant superintendent of public instruction where he was the authorized officer under the Arizona laws and was so recognized by the Federal Government, to apply to the various Federal authorities for allocation and shipment over here of various pieces of surplus property. And, of course, it was his duty then, after it got here, to see that it was applied to the uses for which the Federal Government sent it under the Federal statutes over here for educational purposes.” (T.R. 439)

We are not left to speculate as to what constitutes an adequate instruction on the factors present in conspiracy. The Court in *Butler vs. U. S.*, 197 F. 2d. 561 at page 564 tells us:

“The trial court correctly told the jury the factors that must be present to constitute a conspiracy. It told the jury that ‘The crime of conspiracy is two or more persons combining or confederating with the purpose of committing a public offense.’ This would inform any person of ordinary intelligence that to be guilty more was required to make one a conspirator than mere innocent association with one, although knowing that such a one was engaged in unlawful activities. It is only when he associated with the conspirator for the purpose of committing a public offense that he becomes a member of the conspiracy. We think the trial court’s instructions were adequate and fully advised the jury as to what it must find in order to find appellant guilty of the offense of conspiracy.”

The Trial Court in the case at hand went much farther. This Court in *Carrigan vs. U. S.*, 9 Cir. 197 F. 2d. 817 approved of an instruction in a criminal conspiracy and the instructions are there set forth in full.

Appellee submits that it is a matter of opinion whether those instructions are more adequate on intent and knowledge. Indeed this Court need not draw comparisons. It need only decide that the essential elements of conspiracy were defined in this case, so that the rights of the defendants were well guarded in every essential respect, and no jury of average intelligence could have been misled. Appellee submits that the instructions correctly stated the law.

It is not of moment that the Court in another case emphasized to appellant's satisfaction the elements of knowledge and intent. Appellee might with equal logic complain that the Court did not instruct the jury that "conspiring to defraud the United States is in itself inconsistent with an honest purpose." That is what the Court said in *Razete vs. U. S.*, 199 F. 2d. 44, 50.

We must determine if the instruction given measures up to the norm. That is the test. Judge Lemon recently said:

"The norm that should be applied to instructions has been repeatedly indicated by this Court. In *Barcott v. United States*, 9 Cir., 1948, 169 F. 2d. 929, 932, certiorari denied, 1949, 336 U. S. 912-913, 69 S. Ct. 602, 93 L. Ed. 1076, Judge Orr said:

'Complaint is made of certain instructions requested by appellant and refused, and of certain instructions given by the Court. The alleged errors are said to be found in the language employed in certain instructions and of language omitted in other instructions.

‘Detached paragraphs, sentences and phrases are emphasized and singled out. We have examined the charge given by the Court as a whole and find that it fully and fairly presents the law of the case.’ ”

Benatar vs. U. S., Supra, 743.

Appellant says that the Court erred in not giving instructions requested. The appellant Caywood did not submit any instructions to the Court. It is true that defendant Tompkins (who does not join in this appeal) did. It is also true that Caywood joined in the objections Tompkins made as to the instructions given (T.R. 448). There is at best doubt that the defendant Caywood availed himself of the benefit of Rule 30 of the Rules of Criminal Procedure for the District Courts.

Tompkin’s objections joined in by Caywood stated (T.R. 447) that the propositions submitted were necessary so that the jury might properly relate the charge to the facts, and as the facts relate to Tompkins (T.R. 448). Thus the objections made at the trial joined in by Caywood are at least abortive and certainly inconsistent with the argument now made that the requested instructions were “stock”. A “stock” instruction does not relate to specific persons or specific facts. It is equally true that a “stock” or “fundamental” instruction should be given regardless of a proper request or objection. *Benator vs. U. S., supra*.

Regardless of whether a request need be given for the proposed instructions, appellee submits that an examination of the complete instructions given discloses that the proposed ones on knowledge and intent were in substance given, and measure up to the test. *Benatar vs. U. S., supra*.

SPECIFICATION OF ERROR NO. IV

An instruction that "any improper interference with the United States Government in the discharge of the activities is deemed to be a fraud on the Government" is erroneous and is prejudicial particularly where the Court does not instruct the jury that in order to constitute fraud there must be some evil or dishonest or wrongful intent.

The subject of intent in conspiracy has been dealt with in this brief under Specifications of Error Nos. II and III.

An attempt is made by appellant to lift a phrase from the instruction given, isolate it from the rest, and then conclude that "the Court actually inferred to the jury that it was not necessary that criminal intent be established."

Appellee cannot go along with such an argument. Judge Lemon has stated an adequate answer to this sort of thing in these words:

"And it is the law that an instruction *must* be construed as a whole. A trial judge cannot be expected to cram all the limitations, qualifications, exceptions, and distinctions of a legal principle into one sentence or even into one paragraph. Judicial pronouncements, like every other type of human discourse, must be allowed some *elbow* room. Isolated excerpts are not to be considered apart from their context, and, so considered, are not to be tortured into constituting error."

Benatar vs. U. S., Supra, 743.

Appellant has also said that "nowhere in the instructions were the jury told that in order to find a verdict of guilty it was necessary for them to believe beyond a reasonable doubt that the defendants conspired to do intentional wrong." Appellee cannot go along with that statement either.

The obvious answer is in the instruction.

The following language from the instruction belies the conclusions of appellant, and is set forth for the convenience of the Court.

“Now conspiracy is a combination and agreement by two or more people to do something wrong. In this particular case, the matter has now been reduced to this charge, that these defendants conspired to defraud the United State Government.

“It is charged that they joined together in a mutual enterprise knowingly and criminally and with the full understanding on the part of each other of what they were doing; that they joined together in a scheme to get this Federal surplus property over here to Arizona and make personal use of it. Instead of allowing it to pursue the correct proper course of being distributed to the Arizona schools and school districts, the school system of Arizona.” (T.R. 439)
“The Government case hitches around these DP-2 forms. That was the form of application the Government devised for the handling of this surplus property for getting in into the hands of the state and there for distribution to the schools.

“The particular false statement which the Government claims was made in these DP-2 forms—I notice their language is different in some of them—but I think this language or something like it is in all of them: ‘The property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization.’

“The Government charges in this case that was a false statement and, knowingly false, that Caywood signed or authorized to be signed, if you find that he did, that statement, knew that wasn’t true; he knew he couldn’t get the property unless he did sign it; but he knew he didn’t intend to do that. He knew he didn’t intend to distribute it or see it was distributed to educational institutions but diverted it for his

own profit along with the co-defendant. That is the Government's charge in this case. (T.R. 440)

"The other co-defendant was in that scheme with him. The other co-defendant's part was to get the money out of the property after it got here. It was Caywood's part to get the property over here and the other defendant's part to get something out the property after it got here. Later the money to be divided between them. That is the Government's theory in the case.

"Now I speak of conspiracy as defrauding the Government. That is the statute under which this indictment is brought. Here is what that means:

"Any improper interference with the United States Government in the discharge of its activities is deemed to be a fraud on the government. In other words, here the United States by statute was trying to do something for the Arizona schools and officials were trying to carry out their sworn duty to effectuate the object of the statutes. But that their functioning under that statute was interfered with improperly by defendant Caywood and collaborated in by the other defendant. In that they were not able to carry out that function that is the scheme or fraud on the Government.

"I may say to you here now I have talked with you so far about the Government's theory. In a criminal case, the defendant does not have to prove himself innocent. The Government has to prove him guilty. That is the way our law works. It has always been so in American history anyway. The Government has the burden of proof when it charges a man a criminal, the burden of proving him guilty. (T.R. 441)

"Every defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. That is the burden of proof the Government must satisfy in its charge here for verdict of guilty." (T.R. 442)

It is not the Court's duty to overemphasize factors favorable to the defendant. *Butler vs. U. S.*, *supra*, at page 564. The essential ingredients of conspiracy to defraud are all there and the law is correctly stated. In the language of Judge Allen: "Conspiring to defraud the United States is in itself inconsistent with an honest purpose." *Razete vs. U. S.*, *supra*, at page 50.

SPECIFICATION OF ERROR No. V

Failure of the Court to define to the jury the substantive offense which the defendants are charged with conspiring to violate is reversible error.

Appellant contends that the Court did not explain the substance of 18 U.S.C. 1001, which, for the convenience of the Court, is set forth below:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Appellee admits that the law is well established that in a conspiracy to violate a statute the Court must instruct the jury as to the elements of the offense charged in the statute;

U. S. vs. Levy, 153 F. 2d 955

U. S. vs. Noble, 155 F. 2d 315

U. S. vs. Max, 156 F. 2d 13

U. S. vs. Yasbin, 159 F. 2d 705

U. S. vs. Ausmeier, 152 F. 2d 349, 356

U. S. vs. Pincourt, 159 F. 2d 917, 920

and it is also true that "in a criminal case the Court must instruct on all essential questions of law involved, whether or not it is requested to do so." "*Samuel vs. U. S.*, 169 F. 2d 787 at page 792, where further authority is also cited in support of the rule.

The law also is well established that on appeal the Court on its own initiative will take cognizance of fundamental error.

Screws vs. U. S., 326 U. S. 91, 107

U. S. vs. Atkinson, 297 U. S. 157, 160

Clyatt vs. U. S., 197 U. S. 207, 221, 222

Samuel vs. U. S., 9 Cir., Supra.

Appellant at page 8 in his brief sets forth the objection which the defendant Tompkins made to the instruction complained of. For the convenience of the Court they are set forth here as follows:

"More specifically on those instructions and I especially relate to those that have to do with the falsity of the statements, the DP-2 forms, the charge of the Court did not encompass all of the predicates upon which the facts are to be applied to determine legally not only the falsity but the connection of the falsity to the defendant Tompkins and the same is true in connection with the Court's charge on the conspiracy itself and on the agreement * * *". (T.R. 448)

The defendant Caywood's exception consisted in joining in the above objection. Obviously that objection does not support the argument now made by appellant. No objection or criticism of the kind here raised on appeal was brought to the attention of the Trial Court. The error now assigned is at best an afterthought and, in no event can it be termed plain error and fall within

the contemplation of Rule 52(b) of the Rules of Criminal Procedure ~~but~~^{For} the District Courts.

It also appears that the exception comes within the sweep of Rule 30 of the Rules of Criminal Procedure and fails to meet the requirement of stating distinctly the matter to which he objects.

Appellant's seizure upon one word used by the Court, viz., "improper" does not support the argument that the jury were misled by that word into believing that there need be no intentional wrongdoing on the part of the defendants. The answer, of course, lies in the complete instructions.

The Court did instruct on the subject of intent as pointed out in pages 16-20 in this brief.

Appellant admits that the jury was told in very general terms what the defendants were charged with doing, and that it was told: "They, (the defendants) are on trial for a conspiracy to make false statements and by that means to defraud the Government." This he says is insufficient because the elements of "knowingly and wilfully" were omitted.

The instructions given do not support appellant's argument. Appellee, for the convenience of the Court, sets forth below the instructions given on this subject.

"The Government charges in this case that was a false statement (DP-2 applications) and, knowingly false, that Caywood signed or authorized to be signed, if you find that he did, that statement, knew that wasn't true; he knew he couldn't get the property unless he did sign it; * * * * (T.R. 440)

"Let me come back briefly to the discussion of conspiracy so that you will have clearly in mind the distinction between the conspiracy charge and the charge that the defendants did what we call a substantive wrong. * * * It is charged they conspired to

defraud the Government by making these false applications, that Caywood made them; Tompkins was in on the deal and knew it was going to be done, had to be done, as a matter of fact, to carry out the scheme.” (T.R. 444).

“* * * They are on trial for a conspiracy to make false statements and by that means to defraud the Government.” (T.R. 445).

The defendant Tompkins requested the following instruction found at page 60 of the Transcript of Record:

“Before it can be said that a, or any DP-2 form, was a ‘false’ statement or representation, the burden is upon the prosecution to prove beyond a reasonable doubt that at the time the DP-2 form was filed it was intentionally, deliberately and wilfully untrue, and was then and there known to be thus untrue by the person who filed the DP-2 form.”

The exception taken by the defendant Tompkins and joined in by the defendant Caywood for failure to give the above instruction is found at page 447 in the Transcript of Record:

“That the proposition is on the fact and on the matter in evidence. Each of those instructions state a proposition at law which is germane to the issues and is essential for a jury to be thus instructed in order that they may have a proper grasp and understanding of the fact and to understand in what relation to the charge those facts have held significance and held efficacy.”

To say that the instruction given differs from the one requested is to indulge in “hair splitting.” To say that the Court need do more than he did is to ignore *Moyer vs. U. S.*, 78 F. 2d 624, which appellant cites in his brief. In the *Moyer* case (supra) the Court did not read the statute alleged to be violated by the conspirators. Nor did the Court specifically refer to the statute involved. The Court stated at page 626:

“While generally it may be said to be the better practice to instruct the jury respecting the provisions of the statute or statutes which the purpose of the conspiracy is to violate, it is sufficient if the essential facts constituting the conspiracy charge are stated.”

The Trial Court there did precisely what the Trial Court did in the case at hand. It stated the essential facts constituting the conspiracy charge. That is what appellant has complained about all through his brief. The Court was, in the language of Justice Jackson, trying to set his instructions “in a practical frame and viewed with an eye to all the circumstances of the proceeding.” *Sealfon vs. U. S.*, 332 U. S. 575, 579.

With respect to the requested instruction set forth above the rule is well established that the Court need not give a requested instruction “if the matter to which it refers has been fairly and adequately covered in the instruction given.” *Berenbeim vs. U. S.*, 164 F 2d 679, 684.

We therefore, submit that there is no merit to any of the appellant’s Specifications of Error, and judgment of the District Court should be affirmed.

Respectfully Submitted,

JACK D. H. HAYS,
United States Attorney

EVERETT L. GORDON,
Assistant U. S. Attorney
204 U. S. Court House
Phoenix, Arizona

APPENDIX

INTERNATIONAL HARVESTER TRACTOR REFERRED TO IN OVERT ACTS 5-8 IN THE INDICTMENT

This tractor is identified in Govt. Ex. 1-d, which consists of a DP-2 application and accompanying papers. It is further identified in Govt. Ex. 36. The bill of lading addressed to the Arizona State Educational Agency and the freight bill for this shipment to Arizona from the Government installation was paid for by check signed by the defendant Caywood, Govt. Ex. 12. A man named Johnson sold this tractor to a Mr. Tomison for \$6,878.55 (T.R. 315, 316). A check in that amount was given to the defendant Tompkins, Govt. Ex. 89 and he endorsed it over to Cox & Cox (T.R. 316) the law firm in which the defendant's brother-in-law was a member. The defendant Tompkins also gave a bill of sale, and his signature was acknowledged by his brother-in-law, above referred to, Govt. Ex. 90.

INTERNATIONAL HARVESTER TRACTOR REFERRED TO IN OVERT ACTS 9-12 IN THE INDICTMENT

This tractor is identified in Govt. Ex. 1-d, which consists of a DP-2 application and accompanying papers. It was shipped to the Prisoner of War Camp at Florence, Arizona as disclosed by the freight bill, Govt. Ex. 12. Also in that Exhibit is the check signed by Caywood paying the freight bill. This tractor was brought by truck from Florence, Arizona, to the State Tractor & Equipment Company (T.R. 246, 247) where it was repaired (T.R. 262) Govt. Exs. 61, 62. It was later sold for \$9,536.70 (T.R. 317) Govt. Ex. 88, and a cashier's check was purchased and given to the defendant Tompkins (T.R. 310) Govt. Ex. 87.

INTERNATIONAL HARVESTER TRACTOR
REFERRED TO IN OVERT ACTS 13-16
IN THE INDICTMENT

This property is also identified in Govt. Ex. 1-d, which consists of a DP-2 application and accompanying papers. It was shipped to the Prisoner of War Camp at Florence, Arizona, and was picked up there and hauled to State Tractor & Equipment Company, Phoenix, Arizona (T.R. 247) where it was repaired (T.R. 263) Govt. Exs. 63 and 64. It was then sold for the sum of \$8,532.47 (T.R. 307, 319). A check in that amount was given to a man named Johnson, who made the sale for the defendants, Govt. Ex. 86, and he in turn cashed the check, took out his commission and give the balance to the defendant Tompkins (T.R. 307).

NORTHWEST SHOVEL REFERRED TO IN
OVERT ACTS 17-21 IN THE INDICTMENT

This shovel is identified in Govt. Ex. 1-e, which comprises a DP-2 application and accompanying papers. It was shipped to the Prisoner of War Camp at Florence, Arizona as disclosed by the bill of lading, Govt. Ex. 11, and the freight bill was paid by a check signed by the defendant Caywood, Govt. Ex. 12, and a memorandum presumably in the hand of the defendant Caywood was found in that Exhibit marked "OK—C.W.C." It was moved from Florence, Arizona to the State Tractor & Equipment Company at Phoenix, Arizona for sale (T.R. 266). It was also repaired there (T.R. 267). The State Tractor & Equipment Company sold this shovel (T.R. 266, 267) to the City of Flagstaff, Arizona for the sum of \$12,812.00, Govt. Ex. 68. The defendant Tompkins received two checks from the State Tractor & Equipment Company, one in the sum of \$1,175.61, Govt. Ex. 69, and the other in the sum of \$5,941.25, Govt. Ex. 71 (T.R. 267, 268).

NORTHWEST SHOVEL REFERRED TO IN OVERT ACTS 22-25 IN THE INDICTMENT

This shovel is identified in Govt. Ex. 1-e, which consists of a DP-2 application and accompanying papers. It is further identified in the bill of lading, Govt. Ex. 11 which disclosed that it was shipped to the Prisoner of War Camp, Florence, Arizona. It was later sold by the State Tractor & Equipment Company to San Xavier Rock & Sand Company for \$9,000.00 (T.R. 269, 270) and the defendant Tompkins received a check for \$6,500.00 (T.R. 269, 270) Govt. Ex. 72, which he endorsed over to Cox, Lockwood & Cox, the law firm of his brother-in-law.

MISCELLANEOUS TRACTOR PARTS REFERRED TO IN OVERT ACTS 26-34 IN THE INDICTMENT

These parts are identified in Govt. Ex. 1-b, which is a DP-2 application and accompanying papers. The defendant Caywood in the company of the defendant Tompkins discussed the sale of these parts with Government witness Haggard, the uncle of the defendant Tompkins, who was employed at the State Tractor & Equipment Company (T.R. 218, 219). Haggard first saw these parts on a storage lot near the Phoenix Airport (T.R. 218) and later inspected them when they were uncased on the defendant Tompkins' ranch (T.R. 219). When the Government witness Haggard was talking with the two defendants at the storage lot near the Phoenix Airport he was admonished by one of the defendants not to talk too loud for the obvious reason that workmen who were nearby might overhear the conversation. Most of these parts were new (T.R. 220) and some of them were purchased by the State Tractor & Equipment Company for the sum of \$3,000.00. Govt. Ex. 47 is the check from the State

Tractor & Equipment Company to the defendant Tompkins, which he endorsed over to Z. Simpson Cox, his brother-in-law (T.R. 342). This property is further identified in Govt. Exs. 38, 39, 40 and 41 which are the shipping orders, invoices, receipts and bills of lading pertaining thereto.

SCHRAMM GENERATING SET AND VULCANIZING MOLD REFERRED TO IN THE INDICTMENT AS OVERT ACTS 36-39

This equipment is identified in Govt. Ex. 1-e, which is a DP-2 application and accompanying papers. This equipment was sold by a man by the name of Johnson on behalf of the defendants to General Tire Company of Phoenix, Arizona. A check was given by the General Tire Company of Phoenix to Harry C. Tompkins in the sum of \$1,000.00, Govt. Ex. 91. Harry C. Tompkins also gave a bill of sale identified under the same Exhibit number (T.R. 320).

ROAD GRADER NOT ALLEGED IN THE INDICTMENT

This piece of equipment is identified in Govt. Ex. 1-a, which is a DP-2 application and accompanying papers. It is identified by a photograph, Govt. Ex. 44. It was sold by the State Tractor & Equipment Company to a man by the name of Franklin D. Cox (T.R. 223, 224, 237). A bill of sale was given by the defendant Tompkins, Govt. Ex. 46. The equipment was paid for by a check, Govt. Ex. 45 in the amount of \$1,150.00. State Tractor & Equipment Company gave its check to Harry Tompkins in the sum of \$1,150.00, Govt. Ex. 76, and the check was deposited to the account of Cox, Lockwood & Lockwood, Z. Simpson Cox, a mem-

ber thereof, being a brother-in-law of the defendant Harry Tompkins. This piece of equipment is further identified in Govt. Ex. 10, a freight bill and the check signed by Caywood paying said bill.

No. 14,417

In the
United States Court of Appeals
For the Ninth Circuit

C. W. CAYWOOD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for Rehearing

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FILED

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PAUL P. O'BRIEN, CLERK

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Appellant's Petition for Rehearing

COMES Now the appellant and respectfully moves the Court to grant the appellant a rehearing in the above entitled cause for the reasons set forth below.

I.

INTRODUCTORY MATTERS

On February 10, 1956 this Court affirmed the judgment of conviction of the lower Court. This petition is filed within the time permitted by Rule 25 and is supported by counsel's certificate, under separate cover, that it is not interposed for the purposes of delay; and that in the judgment of counsel, it is well founded.

Counsel for the appellant submit that the decision in this case makes bad law. It is much more far reaching than in its effect on the liberty of Caywood; for it sets a precedent which defeats the government in many, if not most, of its efforts to regain property wrongfully taken from it. The decision also, it is believed, has the consequence of creating titles to personal property which were unknown at common law; and will profoundly alter the effect of business transactions conducted by both the government and private individuals.

II.

ARGUMENT

A. The Prosecution Was Barred by the Statute of Limitations.

This point was argued under Specification of Error No. 1 in Appellant's Opening Brief.

1. IN HOLDING THAT THE STATUTE IS NOT A BAR, THE COURT ASSUMES THAT THE APPELLANT WAS CHARGED WITH A CRIME DIFFERING FROM THE ONE STATED IN THE INDICTMENT.

The Judgment of the Court, based on the opinion of Circuit Judge Fee, is supported by the theory that the last overt act of the appellant was the transfer of surplus property to innocent purchasers for value; and that such transfers were made within three years of the return of the indictment. It is appellant's contention that, assuming that there was a conspiracy, the "overt acts" consisted of the appellant's signing the DP-2 forms; but that in any event there could not be an overt act after the conversion of the property by appellant; and that such conversion occurred prior to the three-year period.

The indictment itself plainly and unequivocally states the crime as a conspiracy to wrongfully thwart the government in its plan to distribute surplus property to eligible educational institutions. In so far as the elements of the

crime are concerned, it was absolutely immaterial how this was done. The gist of the charge is conversion; and so long as the conversion deprived the schools of what was intended for them, the object of the conspiracy was accomplished.

If one keeps in mind the following question while reading the indictment, this conclusion will be seen to be self-evident: suppose that the government proved that the appellant maliciously destroyed the property; or suppose that the government proved that the appellant was using the property himself; or suppose that the government proved that the appellant turned the property over to a "fence". Would such proof have warranted a verdict of guilty? The obvious answer is in the affirmative.

That is the theory of the indictment. That is the theory on which the case was tried. That is the theory on which it was submitted to the jury. See the portion of the instruction set forth in the dissenting opinion;¹ the Bill of Particulars (T.R. 30); and the lower court's statement during the course of the trial; "* * * therein lies the fraud in the case that they were diverted to personal uses" (T.R. 407). The crime was then committed.

It would have been no defense for the appellant, after the conversion, to say, "The property has not reached the hands of an innocent purchaser for value and therefore I have done no wrong."

The evidence showed conversion long prior to sale. The equipment was to be shipped to state surplus disposal depots and there to be selected by the schools (T.R. 97, 105, 135, 163). Taking it to the Tompkin Ranch, some twenty miles

1. Other instructions stressed this: "What the Government claims in this case is that Defendant Caywood joined in a scheme with the other Defendant to get the property * * * and then, with the other Defendant, used it for their personal purposes" (T.R. 440).

from Phoenix (T.R. 214) was a conversion. The holding of it there was not "equivocal", because the property taken there was not inventoried as was the property available to the schools (T.R. 164); nor were invoices on the equipment described in the overt acts sent to the Superintendent of Public Instruction (T.R. 148 *et seq.*). And months before the actual sales of the equipment, some of it was moved to a repair shop and repaired *at the expense of Tompkins* (T.R. 255 *et seq.*). This included the tractor described in Overt Acts 15 and 16 (T.R. 263). Certainly, Tompkins was then asserting dominion over it.

It is suggested in Circuit Judge Pope's specially concurring opinion that the property at the ranch "*might* have been kept there for later delivery to the State." But a return to the rightful owner of converted property does not extinguish the conversion.

The rationale of the Court's opinion seems to be that the crime was not in conspiring to interfere with the proper functioning of the government, but rather in making it totally impossible for the government to function at all in respect to its objectives regarding the disposition of the equipment described in the "Overt Acts". And in reaching this conclusion in order to bring the Overt Acts within the three-year statutory period, it was necessary to decide that "The federal government could have intervened and compelled proper distribution of the property up until the time that each specific item got into the hands of an innocent purchaser for value." But that after it passed to a bona fide purchaser for value without notice, the government could not reclaim it or compel its proper distribution (See footnote 3 of the Opinion).

Aside from this one, no cases could be found by appellant to support the view that the government's rights would be

affected in any manner whatsoever by a wrongful transfer of the property to an innocent purchaser for value. On the other hand, there are many cases that hold that a buyer can get no more rights to nonnegotiable personal property than the seller has.² Uniform Sales Act, § 23 (Revised Stat. Arizona, 1956, § 44-223); 77 C.J.S., *Sales*, § 295, p. 1104; *Yates v. Russell* (1919), 20 Ariz. 338, 180 P. 910.

Whatever rights the government had when the property was converted still existed when it was sold to innocent purchasers. However, under the decision in this case, the government is now barred from asserting its rights; and it can only be concluded that in all other instances, the government cannot claim property which has been wrongfully taken from it if the possessor establishes that he bought for value without notice.³ And the decision is broad enough to cover transactions between individuals; that is, for example, one who acquires property by theft can bestow good title on the purchaser. The rule is neoteric. It rejects "one of the best settled maxims of the law" (*Simmons Creek Coal Co. v. Doran* (1892), 142 U.S. 417, 12 S.Ct. 239, 35 L.ed. 1063): *caveat emptor*!

Caveat emptor generally does not apply to negotiable personalty such as money.

This leads to a discussion of *Meyer v. United States*, 1915, 9 Cir., 220 F. 800. It explains (more adequately than did counsel for appellant in the Opening Brief) one of the points that appellant relies on. In that case the essence of the con-

2. There are certain exceptions such as where the doctrine of estoppel can be invoked.

3. The Court's reasoning applies whether title remained in the United States or passed to the State. Circuit Judge Pope writes, "I would think that if the Government or the State of Arizona chose to recover any of this property it could readily do so whether the purchaser did or did not have notice." The authorities cited in the text support this.

spiracy was to defraud the government of large sums of money by causing it to pay an excessive amount for zinc. The government had issued a check to the conspirators but it was not deposited for several days. The critical period of the statute of limitations fell between the date of issuance and the date of deposit. The court held that the last overt act was when the check was deposited and credit was given for it by the bank, for up until that time the government could have stopped payment. The court pointed out that the conspiracy was to defraud the government out of money; and that the object was not accomplished until the conspirators obtained the money (or credit for it). The Court also pointed out that if the conspiracy had been to fraudulently obtain the check, then the last overt act would have been the acceptance of the check. So, here the gist was conversion; and on its accomplishment the crime was consummated.

2. IN HOLDING THAT THE STATUTE WAS NOT A BAR, THE COURT ASSUMED FACTS WHICH ARE NOT SUPPORTED BY THE RECORD.

In arriving at its conclusion, the Court necessarily had to find that those who took the property from Tompkins were innocent purchasers for value without notice. There is nothing in the record to support this. The government itself implies that it is not so, for it states in its brief (page 6), that the State Tractor and Equipment Company was a "cloak" to conceal Tompkins' operations. And how "innocent" is a purchaser of valuable machinery from a deputy collector of internal revenue (T.R. 371) who apparently does not even inquire as to indicia of title?

There was evidence that purchases were made in the "regular course of business" (T.R. 242). There is no evidence, however, to show the relationship between what was

paid for the property and its real worth; nor was there any other evidence to establish the characteristics of an innocent purchaser. The burden of proof in regard to this element was on the government. It did not carry that burden.

B. The Court's Instructions Were Inadequate to Fairly Present the Case to the Jury.

This Court says: "The charge of the court sufficiently covered knowledge of the accused by requiring the jury to find the defendants 'joined together in a mutual enterprise knowingly and criminally with the full understanding on the part of each other of what they were doing.'" The lower court did not so charge the jury. The matter set forth in the inner quotes is the court's interpretation of what the indictment *charged*. The court's actual instruction is (T.R. 442)

* * *

"If you find beyond a reasonable doubt the circumstances *indicate* that there was such an agreement between these parties, it will be your duty to find them guilty." (Italics added).

CONCLUSION

It is respectfully submitted that Appellant's Petition for Rehearing should be granted.

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Attorneys for Appellant

No. 14432

(and consolidated cases Nos. 14432-14440
and Nos. 14442-14446)

United States
Court of Appeals
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UNITED STATES OF AMERICA,
Appellant,
vs.

DIX BOX CO. and BENJAMIN DIX, doing busi-
ness as DIX BOX CO., Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

JAN 7 1955

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CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LAUGHLIN E. WATERS,
United States Attorney,
MAX F. DEUTZ,
JAMES R. DOOLEY,
Assistants United States Attorney,
600 Federal Building,
Los Angeles 12, California.

For Appellees:

LILLIE & BRYANT,
WALTER M. CAMPBELL, JR.,
1117 Rowan Building,
458 South Spring Street,
Los Angeles 13, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern District of California, Central Division

Civil No. 15451-HW

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DIX BOX CO., a partnership, BENJAMIN DIX,
HYMAN DIX, MAX DIX and ROSE MIS-
TOFSKY, individually and as partners in DIX
BOX CO., Defendants.

COMPLAINT FOR DAMAGES

The United States of America brings this suit against the above named defendants and alleges:

I.

This is a civil action brought to recover damages for violations by defendants of a price stabilization regulation issued pursuant to the Defense Production Act of 1950, as amended (50 U.S.C. App. Sec. 2061, et seq.). Jurisdiction of this suit is vested in this Court by Section 706(b) of the Defense Production Act of 1950, as amended [50 U.S.C. App. Sec. 2156(b)], and also by Section 1345, Title 28, United States Code.

II.

Defendant Dix Box Co. is a partnership composed of defendants Benjamin Dix, Hyman Dix, Max Dix and Rose Mistofsky. At all times herein mentioned defendants were and are now engaged in

the business of reconditioning [2] and selling used wooden agricultural containers, having their principal place of business at 1023 East 14th Street, Los Angeles, California, which is within the territorial limits of the jurisdiction of this Court.

III.

On April 29, 1952, acting pursuant to the Defense Production Act of 1950, Executive Order 10161 (15 F.R. 6105), and Economic Stabilization Agency General Order No. 2 (16 F.R. 738), the Director of Price Stabilization issued Ceiling Price Regulation 142 (17 F.R. 3822), which became effective on May 5, 1952 and continued in full force and effect from said date to and including February 16, 1953.

IV.

Ceiling Price Regulation 142 established dollars and cents ceiling prices for certain sales of used wooden agricultural containers, including those mentioned in paragraph V hereof. At all times herein mentioned:

(a) Section 2 of this Regulation specified dollars and cents ceiling prices for each of the various kinds of agricultural containers including those sold in the sales and deliveries mentioned in paragraph V hereof.

(b) Section 10(a) of this Regulation prohibited the sale of any used wooden agricultural container at a price in excess of the ceiling price established therefor.

V.

During the period beginning May 5, 1952 and continuing to and including January 31, 1953, defendants sold and delivered certain used wooden agricultural containers at prices totalling \$4,964.38 in excess of the ceiling prices established by Ceiling Price Regulation 142. Said sales and deliveries are identified in Schedule A, which is attached hereto and made a part hereof, and which sets forth the quantity of each type of container sold during said period, the unit price charged and received therefor, the unit ceiling price applicable thereto, and the amount of the overcharges received by defendants in said sales and deliveries.

VI.

Each of the purchasers of the containers sold and delivered in the [3] sales and deliveries identified in Schedule A purchased the same in the course of his trade or business. None of said sales or deliveries arose because defendants acted upon or in accordance with the written advice or instructions of the President of the United States, or any officer or employee authorized to act for him. None of said sales or deliveries arose out of the sale of any material or services to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

Wherefore, plaintiff prays for judgment against defendants, as follows:

1. For the sum of \$14,893.14, being treble the amount of the total overcharges made in the sales

and deliveries mentioned in paragraph V hereof;

2. For reasonable attorney's fees and costs of litigation as determined by the Court;

3. For its court costs incurred herein; and

4. For such other and further relief as the Court may deem just and equitable.

WALTER S. BINNS,

United States Attorney

CLYDE C. DOWNING,

Assistant U. S. Attorney, Chief of
Civil Division

/s/ By ALDEN F. HOUCK,

Special Assistant to the United
States Attorney

[4]

SCHEDULE "A"

Type of Container Sold	No. of contain- ers sold during period	Selling price per container	Ceiling price per con- tainer**	Overcharge	
				Per con- tainer	Total
Tray	560	\$0.08	\$0.07	\$0.01	\$ 5.60
Tray-Sanded	1,290	.10	.09	.01	12.90
Tray-Sanded	12,960	.12	.09	.03	388.80
Flat-Sanded	11,460	.16	.15	.01	114.60
Lug	500	.14	.12	.02	10.00
Lug-Sanded	5,036	.16	.15	.01	50.36
Lug-Sanded	3,656	.165	.15	.015	54.84
Lug-Sanded	40,554	.17	.15	.02	811.08
Lug-Sanded- Labeled*	548	.16	.15	.01	5.48
Lug-Sanded- Labeled*	4,956	.17	.15	.02	99.12
Lug-Sanded	6,248	.18	.15	0.3	187.44

Type of Container Sold	No. of contain- ers sold during period	Selling price per container	Ceiling price per con- tainer**	Per con- tainer	Overcharge Total
Lug-Sanded- Labeled*	400	.18	.15	.03	12.00
Lug-Sanded	10,652	.20	.15	.05	532.60
Celery	760	.16	.15	.01	7.60
Celery	315	.17	.15	.02	6.30
Celery	16,703	.18	.15	.03	501.09
Celery	9,941	.20	.15	.05	497.05
Lettuce	133,220	.25	.24	.01	1,332.20
Lettuce-Labeled*	9,078	.25	.24	.01	90.78
Wirebound	21,396	.15	.14	.01	213.96
Basket	1,529	.12	.10	.02	30.58

Total Overcharges \$4,964.38

* These containers were sold "Labeled"; accordingly selling prices were adjusted to reflect a credit of 1c per container for this service.

** All containers were considered to be "Dealer Grade 1".

[Endorsed]: Filed May 1, 1953.

[Title of District Court and Cause.]

ANSWER

Come Now the defendants, Dix Box Co., a partnership, Benjamin Dix, Hyman Dix, Max Dix and Rose Mistofsky, and admit, deny and allege as follows:

I.

In response to Paragraphs I, III, IV, V and VI,

defendants generally and specifically deny each and all of the said paragraphs.

II.

In further response to plaintiff's complaint, defendants admit, deny and allege:

(a) In further response to Paragraph IV, defendants admit that the Regulation provides what said paragraph alleges.

(b) In further response to Paragraph V defendants deny an overcharge in the sum as set forth in said paragraph, the sum of \$4,964.38, any other sum, or at all.

(c) In further response to Paragraph V, defendants at this [6] time do not have information or belief sufficient to enable them to answer the allegations contained in said paragraph concerning the sales and deliveries identified in Schedule A, and based upon such lack of information and belief, deny said sales as set forth in said Schedule, any other sales or at all, except as defendants may hereinafter admit. Defendants do admit that sales and deliveries of boxes, to wit, used wooden agricultural containers, were made during the period beginning May 5, 1952, to and including January 31, 1953.

For a Further, Separate and Affirmative Defense, Defendants Allege:

I.

Defendants deny any overcharges in any sum whatsoever. Without conceding any overcharges or violations of any type, defendants allege that if

any violations did in fact occur, same occurred after defendants exercised good faith and reasonable and practical precautions to avoid said violations and the occurrence of same, and that said violations were not the result of any wilful misconduct on the part of these defendants.

Defendants Demand a Trial by Jury of All Issues Involved Herein Properly Triable by and Before a Jury.

Wherefore, defendants pray that plaintiff take nothing by its complaint; that defendants have judgment herein, and for such other and further relief as to the Court may seem just and proper.

/s/ DAVID S. SMITH,

Attorney for Defendants [7]

Duly Verified.

Affidavit of Service by Mail attached. [8]

[Endorsed]: Filed June 4, 1953.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff, the United States of America, requests defendants, Dix Box Co. and Benjamin Dix, doing business as Dix Box Co., within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial.

I.

That each of the following statements is true:

(a) That the purchasers of the containers specified in columns one, two, and three of Schedule "A" attached to the Complaint filed herein, purchased the same in the course of their trade or business.

(b) That the purchasers of the containers specified in columns one, two, and three of Schedule "A" attached to the Complaint filed herein were engaged in a business or occupation or profession in which used wooden agricultural containers were used or disposed of.

(c) That none of the purchasers of the containers referred to in columns one, two, and three of Schedule "A" attached to the Complaint filed herein, has [9] within thirty days from the date of the sale of said containers brought an action on account of an overcharge under § 2109 (c) U.S.C.

(d) That defendants do not know of any action brought by the purchasers of the containers referred to in columns one, two, and three of Schedule "A" attached to the Complaint filed herein, which action was brought within thirty days from the date of the sale of said containers on account of an overcharge under § 2109 (c) U.S.C.

(e) That at no time have defendants received any written advice from the President of the United States or from any officer or employee authorized to act for him, advising or instructing said defendants not to comply with the provisions of Ceiling Price

Regulation 142 referred to in the Complaint filed herein.

(f) That defendants do not know nor have they known of the existence of any written advice or instructions of the President of the United States or of any officer or employee authorized to act for him advising or instructing said defendants not to comply with the provisions of Ceiling Price Regulation 142 referred to in the Complaint filed herein.

(g) That none of the sales and deliveries referred to in columns one, two, and three of Schedule "A" attached to the Complaint filed herein, was made to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief,

Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

Attorneys for Plaintiff [10]

Affidavit of Service by Mail attached. [11]

[Endorsed]: Filed January 29, 1954.

In the United States District Court, Southern District of California, Central Division

United States of America, Plaintiff,

vs.

Dix Box Co. and Benjamin Dix doing business as
Dix Box Co., Defendant—No. 15451.

Elsie Ann Hall, Defendant—No. 15453.

Joe Agopian, Defendant—No. 15454.

Tom V. Potigium, Defendant—No. 15455. [15]

Mack Chirpin, Defendant—No. 15452.

Dave Savetnick, Defendant—No. 15456.

Isadore Ginsberg, Defendant—No. 15457.

Harry Simonian, Defendant—No. 15458.

James O. Fugitani, Defendant—No. 15459.

Walter S. Abe, Defendant—No. 15460. [16]

H. M. Hernandez & Sons, etc., Defendants—No.
15462.

Standard Crate Co., a partnership, et al., Defendants—No. 15463.

Acme Crate Co., a partnership, etc., Defendants—
No. 15464.

Kazuo Yano, Defendant—No. 15471.

ANSWER TO REQUEST FOR ADMISSION UNDER RULE 36

Come now the defendants in the above-entitled cases and in answer to the request by the United States of America for Admission Under Rule 36 object to the requests enumerated (a) (b) and (c) on the grounds that said matters are not within the knowledge of these defendants, are matters which go directly to the jurisdiction of this Court and therefore cannot be waived by stipulation, and are matters which are peculiarly within the knowledge

[17] of the Plaintiff and should have been alleged by the plaintiff herein.

Dated: February 5, 1954.

LILLIE & BRYANT, and
WALTER M. CAMPBELL, JR.,
/s/ By WALTER M. CAMPBELL, JR.,
Attorneys for Defendants [18]

Affidavit of Service by Mail attached. [19]

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause No. 15451.]

STIPULATION AS TO REMAINING ISSUES

Whereas, in open Court at a pre-trial conference held on January 15, 1954, the Court directed the parties hereto to file a stipulation as to the remaining issues in the above entitled action,

It Is Hereby Stipulated by and between the above-named parties, through their respective counsel, that:

I. Facts Which Require No Proof

(a) From May 5, 1952, to January 31, 1953, inclusive, defendants were "dealers" in used wooden agricultural containers and were engaged in the business of reconditioning and selling said containers.

(b) From May 5, 1952, to January 31, 1953, inclusive, defendants sold and delivered the types and respective numbers of used wooden agricultural containers as set forth in columns one and two of

Schedule "A" attached to the complaint filed herein, at the respective selling prices per container as set [20] forth in column three of said Schedule.

(c) From May 5, 1952, to January 31, 1953, inclusive, defendants sold the containers referred to in columns one, two and three of Schedule "A" attached to the complaint filed herein in wholesale lots.

(d) Defendants do not know of any action brought by the purchasers of the containers referred to in columns one, two, and three of Schedule "A" attached to the complaint filed herein, which action was brought within thirty days from the date of the sale of said containers on account of an overcharge under 50 USCA 2109(c).

(e) At no time have defendants received any written advice from the President of the United States or from any officer or employee authorized to act for him, advising or instructing said defendants not to comply with the provisions of Ceiling Price Regulation 142 referred to in the complaint filed herein.

(f) None of the sales and deliveries referred to in columns one, two, and three of Schedule "A" attached to the complaint filed herein, was made to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

(g) Order No. L-117, dated June 28, 1951, issued by the Director of Price Stabilization, specified dollars and cents ceiling prices for defendants for some of the types of used wooden agricultural containers

enumerated in Schedule "A" of the complaint filed herein.

(h) Ceiling Price Regulation 142, dated April 29, 1952 (hereafter referred to as CPR 142), issued by the Director of Price Stabilization, specified dollars and cents ceiling prices for all of the types of wooden agricultural containers enumerated in Schedule "A" of the complaint filed herein.

(i) With few exceptions, the prices at which defendants sold used wooden agricultural containers from May 5, 1952, to January 31, 1953, did not exceed the prices specified in Order No. L-117, as to those types of containers for which said Order specified dollars and cents prices. Defendants contend there were no exceptions. [21]

(j) On or about May 15, 1952, a meeting or meetings were held between representatives of the Los Angeles Box and Crate Dealers' Association and officials of the Office of Price Stabilization, Los Angeles, California.

II. Defendants' Contentions

(a) During the period of the alleged violation defendants' ceiling prices for the sale of used wooden agricultural containers were governed by the provisions of Order No. L-117.

(b) CPR 142 is invalid.

(c) At the meeting or meetings held between representatives of the Los Angeles Box and Crate Dealers' Association and officials of the Office of Price Stabilization, Los Angeles, California, the latter officials either expressly or tacitly authorized

defendants to continue selling used wooden agricultural containers according to the provisions of Order No. L-117 and also promised to get CPR 142 amended.

(d) The described conduct of these officials operates to estop the United States from enforcing against defendants the provisions of CPR 142.

III. Plaintiff's Contentions

(a) That defendants' ceiling prices for the sale of used wooden agricultural containers during the period of the violations were not governed by the provisions of Order No. L-117; but were governed instead by the provisions of CPR 142; for the reason that CPR 142 superseded Order No. L-117.

(b) That CPR 142 was valid, and in full force and effect during this period.

(c) That even if a question as to the validity of CPR 142 existed, this Court does not have jurisdiction to determine the question.

(d) That officials of the Office of Price Stabilization, Los Angeles, California, did not make the representations as alleged in defendants' contention II (d) above. [22]

(e) That even if these officials made the representations as alleged by defendants, such conduct would not estop or bind the United States, nor prevent plaintiff from enforcing against defendants the provisions of CPR 142.

IV. Remaining Issues

(a) Whether defendants' ceiling prices were governed by CPR 142 or Order No. L-117.

(b) Whether officials of the Office of Price Stabilization made the representations as alleged by defendants.

(c) Whether these representations if made as alleged by defendants constitute a defense to this action.

(d) Whether this Court has jurisdiction to consider the validity of CPR 142.

(e) If this Court has jurisdiction to consider the validity of CPR 142, whether this regulation is valid.

Dated: February 8, 1954.

LILLIE & BRYANT, and

WALTER M. CAMPBELL, JR.,

/s/ By WALTER M. CAMPBELL, JR.,

Attorneys for Defendants

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

/s/ By JAMES R. DOOLEY,

Attorneys for Plaintiff

It Is So Ordered this 8th day of February, 1954.

/s/ HARRY C. WESTOVER,

Judge, U. S. District Court [23]

[Endorsed]: Filed February 8, 1954.

In the United States District Court, Southern District of California, Central Division

[Title of Causes 15451-60, 15462-64 and 15471.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled causes came on regularly for trial on the 11th and 12th days of February, 1954, before the Honorable Harry C. Westover, Judge presiding sitting without a jury, a jury having been expressly waived, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant U. S. Attorney and James R. Dooley, Assistant U. S. Attorney, by James R. Dooley appearing for the plaintiff, and Lillie & [28] Bryant and Walter M. Campbell, Jr. by Walter M. Campbell, Jr. appearing for the defendants, and said causes having been consolidated for trial, and evidence both oral and documentary having been introduced, together with stipulations then and theretofore entered into by the parties through their respective counsel, and the causes having been submitted for decision on the 12 day of February, 1954, and being fully advised in the premises the Court now makes its Findings of Fact as follows:

Findings of Fact

I.

That the defendants, and each of them, were at all times mentioned in the respective complaints herein, and for a number of years prior thereto,

engaged as dealers in the business of buying, reconditioning and selling used wooden agricultural containers, having their principal places of business in or about the City of Los Angeles, State of California, and within the territorial limits of the jurisdiction of this Court.

II.

That under and by virtue of the authority vested in the President of the United States by the Defense Production Act of 1950, which authority was theretofore duly delegated by him to the Director of Price Stabilization, ceiling prices to be obtained by the dealers in the resale of used wooden agricultural containers, including the defendants, was fixed at the highest prices obtained by them during the period December 20, 1950, to January 19, 1951, as provided by the General Ceiling Price Regulation.

III.

That because of the seasonal variations of the fruit and vegetable business ceiling prices, the said prices which became effective under the General Ceiling Price Regulation as referred to herein, were established during a period of few sales and proved to be inadequate for a large segment of the used container industry, and particularly with respect to the prices obtained for the major items sold by the defendants herein.

IV.

That by reason of the inequities referred to in Paragraph III hereof, [29] the defendants, to-

gether with others in the similar business in the vicinity of the City of Los Angeles, State of California, within the jurisdiction of this Court, engaged attorneys and filed protests with the Office of Price Stabilization at Washington, D. C.; that as a result thereof the Office of Price Stabilization issued its certain Order known as Order L-117 heretofore admitted in evidence as defendants' Exhibit "A" herein, establishing dollar and cent maximum ceiling prices for those certain types of containers which are the principal commodities sold by the defendants herein. That from and after the issuance of said Order L-117 and up to and including the 31 day of January, 1953, which period includes the time that all of the acts complained of as having been performed by the defendants herein in the various complaints enumerated in the heading hereof, the defendants, and each of them, resold used wooden agricultural containers at a price not to exceed the ceiling prices referred to in said Order L-117 or in excess of the prices set by General Ceiling Price Regulation as to those commodities not affected by Order L-117.

V.

That on or about April 29, 1952, the Office of Price Stabilization over the signature of the Director of Price Stabilization purported to promulgate that certain Ceiling Price Regulation No. 142, a copy of which has been admitted in evidence and marked Plaintiff's Exhibit "1". That prior to the promulgation of said Ceiling Price Regulation No.

142 and prior to the dollar and cents ceiling prices for retailers and dealers as set forth therein, the said Director of the Office of Price Stabilization or his representatives made no attempt to, nor did they consult with the defendants herein or any of their representatives, or with other dealers in the used wooden agricultural container business. That the defendants herein represent between 90% and 95% of the volume of business performed in the used Wooden Agricultural container business in the area adjacent to Los Angeles and San Diego, California, which is the territory purportedly embraced by Ceiling Price Regulation Number 142. [30]

VI.

That immediately after learning of purported Ceiling Price Regulation Number 142, the defendants herein, through their duly appointed representatives, held meetings with the duly authorized representatives of the Office of Price Stabilization at Los Angeles, California, such meetings first being held in the early part of May, 1952, and continuing from time to time until the 20 day of January, 1953, at which said latter date the Office of Price Stabilization in Los Angeles was disbanded and all ceiling prices removed so far as the used wooden agricultural container industry was concerned. That at said meetings, and each of them, it was the expressed agreement of both the representatives of the Industry and those of the Office of Price Stabilization that the dollar and cents prices as set forth in purported Ceiling Price Regulation No. 142 did not

in fact establish dealers' ceiling prices at a level approximately 18% above the projected general ceiling price regulation base period price level but did in fact lower the price to be received by dealers in many instances and raised the prices which the dealer was to pay to the retailer so as to lower the margin of gross profit to the dealer to the extent that if he were to follow such purported ceiling Price Regulation 142 he would in fact be operating at a net loss. That at said meetings the defendants were advised that while helpful it would not be necessary for them to engage attorneys and make formal protests to Washington which would necessarily consume several months of elapsed time in that the Los Angeles office of the Office of Price Stabilization would forthwith make the necessary economical investigations and recommendations to Washington that Ceiling Price Regulation No. 142 be altered or amended to provide adequate dealer and retailer ceiling prices. That the defendants herein thereupon stated that they would and thereafter did continue to comply with the ceiling prices as established by the said Order L-117 and the General Ceiling Prices Regulation. That said prices as utilized by the defendants herein were open and notorious and known at all times to the said officials of the Office of Price Stabilization who did not object thereto. That in so conducting [31] their business the defendants, and each of them, did so in reliance and belief that they were fully and adequately complying with the law and regulations applicable to such sales.

Conclusions of Law

I.

That Ceiling Price Regulation Number 142 is void and of no force and effect whatsoever by reason of the fact that the said regulation is arbitrary and that no effort was made by the Office of Price Stabilization to comply with the provisions of Title 50 U.S.C. Appendix, Section 2104 in advising or consulting with the members of the Industry with respect thereto.

II.

That the President of the United States and those to whom he has delegated authority are estopped from enforcing the provisions of purported Ceiling Price Regulation 142 by reason of the conduct and promises, expressed and implied, by said officials as aforesaid.

Dated: February 26th, 1954.

/s/ HARRY C. WESTOVER,

Judge of the U.S. District Court [32]

Affidavit of Service by Mail attached. [33]

[Endorsed]: Filed February 26, 1954.

In the United States District Court, Southern District of California, Central Division

Civil No. 15451-HW

UNITED STATES OF AMERICA, Plaintiff,

vs.

DIX BOX CO. and BENJAMIN DIX, doing business as DIX BOX CO., Defendants,

JUDGMENT

The above-entitled cause come on regularly for trial on the 11th and 12th days of February, 1954, before the Honorable Harry C. Westover, Judge presiding sitting without a jury, a jury having been expressly waived, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant U. S. Attorney and James R. Dooley, Assistant U. S. Attorney, by James R. Dooley appearing for the plaintiff, and Lillie & Bryant and Walter M. Campbell, Jr. by Walter M. Campbell, Jr. appearing for the defendants, and evidence both oral and documentary having been introduced, together with stipulations then and theretofore entered into by the parties through their respective counsel, and the cause having been submitted for decision, and the Court having heretofore made and caused to be filed herein its Findings of Fact and Conclusions of Law and being fully advised:

Wherefore, by reason of the law and the Findings of Fact aforesaid, it is Ordered, Adjudged, and Decreed that the plaintiff do have and recover nothing from the defendants and that the defend-

ants be allowed their [34] costs and disbursements incurred in said action amounting to the sum of \$.

Dated: February 26th, 1954.

/s/ HARRY C. WESTOVER,
Judge of U. S. District Court [35]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Judgment Docketed and Entered March 1, 1954.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause No. 15451.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 1, 1954.

Dated: April 28, 1954.

LAUGHLIN E. WATERS,
United States Attorney
MAX F. DEUTZ,
Assistant U. S. Attorney, Chief,
Civil Division

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney
Attorneys for Plaintiff [37]

Affidavit of Service by Mail attached. [38]

[Endorsed]: Filed April 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 41, inclusive, contain the original Complaint; Answer; Motion to Dismiss and for Judgment on the Pleadings; Request for Admissions Under Rule 36; Answer to Request for Admissions Under Rule 36; Stipulation as to Remaining Issues; Minutes of the Court for February 11 and 12, 1954; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal which, together with Reporter's Transcript of Proceedings on February 11 and 12, 1954, and original exhibits, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 19 day of July, A. D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court, Southern District of California, Central Division

[Title of Causes 15451-60, 15462-64 and 15471.]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, February 11, 1954

Honorable Harry C. Westover, Judge presiding. [1*]

Appearances: For the Plaintiff: Laughlin E. Waters, United States Attorney; by James R. Dooley, Assistant United States Attorney. For the Defendants: Lillie & Bryant, by Walter M. Campbell, Jr., Esq., 458 South Spring Street, Los Angeles, California. [2]

The Clerk: No. 1, 15451-HW Civil, United States vs. Dix Box Company, et al.

Mr. Campbell: Ready for the defendant.

Mr. Dooley: Ready for the Plaintiff.

The Clerk: No. 2, 15452-HW Civil, United States vs. Mack Chirpin.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 3, 15453-HW Civil, United States vs. Elsie Ann Hall.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Clerk: No. 4, 15454-HW Civil, United States
vs. Joe Agopian.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 5, 15455-HW Civil, United States
vs. Tom V. Potigium.

Mr. Dooley: Ready.

Mr. Campbell: Ready.

The Clerk: No. 6, 15456-HW Civil, United States
vs. Dave Savetnick.

Mr. Campbell: Ready. [4]

Mr. Dooley: Ready.

The Clerk: No. 7, 15457-HW Civil, United States
vs. Isadore Ginsberg.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 8, 15458-HW Civil, United States
vs. Harry Simonian.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 9, 15459-HW Civil, United States
vs. James O. Fugitani.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 10, 15460-HW Civil, United States
vs. Walter S. Abe.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 11, 15462-HW Civil, United States
vs. H. M. Hernandez & Sons, et al.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 12, 15463-HW Civil, United States vs. Standard Crate Co., et al.

Mr. Campbell: Ready.

Mr. Dooley: Ready. [5]

The Clerk: No. 13, 15464-HW Civil, United States vs. Acme Crate Co., et al.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

The Clerk: No. 14, 15471-HW Civil, United States vs. Kazuo Yano.

Mr. Campbell: Ready.

Mr. Dooley: Ready.

Mr. Campbell: May the cases be consolidated, your Honor?

The Court: I was going to make an order that the cases be consolidated for trial. There is no necessity of filing findings of fact and conclusions of law and judgment in each of these cases, so the cases will be consolidated for trial. The evidence received in one case will be received in all cases.

I have here a motion to dismiss and/or judgment on the pleadings. Denied.

We will proceed with the trial of these cases.

I think that most of the issues have been agreed to between the parties. The only real issue, as far as I can ascertain, is whether or not there was a promise on the part of the government to change the regulation. I think the defendants all admit that if they are bound by the official regulations, they are in violation. I think the government admits if they can rely upon the promises and representations in the letter they received, they are not in violation.

I think that [6] is the only question of fact left before the court.

Mr. Dooley: Your Honor, there was one admission that I called upon the defendants to admit that was minor in nature, and yet plaintiff believes he should introduce some evidence on that point if the defendants will not admit the point.

The Court: What is it?

Mr. Dooley: That the purchases of the containers referred to in Schedule A attached to the complaint purchased the same in the course of their trade or business. I will read directly from the complaint.

The Court: Well, let's get the admissions and see if the defendants will not admit it now. Which admission is it? Is it A?

Mr. Dooley: A, I believe, your Honor, and B. B is an evidentiary admission going to establish that fact.

The Court: Well, under the Request for Admission:

"Come now the defendants in the above-entitled causes and in answer to the request by the United States of America for admission under Rule 36 object to the requests enumerated (a), (b), and (c) on the grounds that said matters are not within the knowledge of these defendants."

The first request is: "That the purchases of the containers specified in columns 1, 2, and 3 of Schedule 'A' attached to the complaint filed herein, purchased the same in [7] the course of their trade or business."

Can't you admit they did? How else could they be purchased?

Mr. Campbell: There are two situations, your Honor, in one of which these various dealers who are here before the court in many instances sold to each other, which were for resale.

As to the other purchases, I have no doubt that they purchased in the usual course of their trade or business. However, we have no means of knowing to what uses those particular purchases were put. So far as we know, they were purchased in the course of trade or business.

The Court: What difference does it make? I don't think it makes any difference at all, does it?

Mr. Campbell: It makes a difference as to whether or not the government has jurisdiction or the right to sue for the overcharges. The Act provides that the government in some instances has a right to sue for charges and in others it does not.

The Court: Do you mean to say unless these purchases were made in the usual course of business that the government has no right to sue?

Mr. Campbell: The government only has a right to sue if they were in the usual course of business.

The Court: Can you stipulate they were sold in the usual course of business? [8]

Mr. Campbell: They were sold in the usual course of business of these dealers' business, yes, your Honor.

The Court: What difference does it make whether they were purchased or whether they were sold?

Mr. Dooley: The purchasers purchased them in

the course of their trade or business is the fact to be established in this case.

The Court: How can you establish that? Have you got all the purchasers who will testify?

Mr. Dooley: No, your Honor. I wanted to establish it in different ways. First, from the stipulation of the defendants. The defendants stipulated under (c) that from May 5, 1952, to January 31, 1953, inclusive, defendants sold the containers referred to in clauses 1, 2, 3 of Schedule A, attached to the complaint filed herein in wholesale lots. That is an admission.

An inference can be drawn that the containers if purchased or sold in wholesale lots could only be used in the course of trade or business.

Then I have a witness who is in the field of the used wooden agricultural container industry who will testify that he knows of no other use that these containers have been used for, and he has been in the field for quite some time, other than in the course of trade or business. He will testify what use they were put to. [9]

Then, if necessary, I will have to call each of the defendants under Rule 43(b) to question them as to the type of persons to whom they sold them and just what business they were engaged in, if they know.

The Court: These defendants sold, there is no question that these defendants sold the containers?

Mr. Campbell: That's right, your Honor.

The Court: There is no argument they weren't sold in the ordinary course of business.

Mr. Campbell: That is correct.

The Court: I don't know why it is material at this time to determine whether or not the purchasers were purchasing them in the ordinary course of business. As far as I am concerned, they were. I am not interested in going into that. Suppose we let that go and if it becomes a real issue in this case, we will go into it.

Mr. Dooley: Your Honor, I would like to have a little evidence other than stipulation for the purpose of the record.

The Court: All right. You may call any witness you want to.

Mr. Dooley: All right. Mr. Frank Alvarado, will you take the stand? [10]

FRANK ALVARADO

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated and state your name, please?

The Witness: Frank Alvarado.

The Clerk: Will you spell your last name?

The Witness: A-l-v-a-r-a-d-o.

Direct Examination

Q. (By Mr. Dooley): Mr. Alvarado, what is your business?

A. I am the owner of the Alvarado Crate Company.

Q. Where is that business located?

(Testimony of Frank Alvarado.)

A. 2110 East 15th Street, Los Angeles.

Q. Is that in California? A. Yes, sir.

Q. What does your business involve, Mr. Alvarado?

A. Produce containers of all types.

The Court: Second hand?

The Witness: Second hand, and also new.

Q. (By Mr. Dooley): How long have you been in this business? A. Since 1936. [11]

Q. I will show you a document which purports to be ceiling price regulation 142, and call your attention to Section 2 of that regulation. Will you tell the court, please, whether the types of containers enumerated in this regulation are the type of containers which you sell?

Mr. Campbell: Object to that as immaterial, what this witness sells.

The Court: Objection overruled.

Mr. Campbell: I will stipulate that the document is a true copy of Regulation 142, and it may be received, if Mr. Dooley desires to offer it.

Mr. Dooley: I think the court will take judicial notice of an administrative regulation.

The Court: I would, but if you have an extra copy of it for the purpose of the record, it would be advisable to file it as an exhibit.

Mr. Dooley: Except there are underlinings.

The Court: Have you got an extra copy?

Mr. Dooley: No, except the one that has the underlinings on it.

(Testimony of Frank Alvarado.)

The Court: All right.

Mr. Dooley: The plaintiff will offer that in evidence as Plaintiff's Exhibit 1.

The Court: It may be received in evidence and the court will disregard, and so will the witness disregard, any markings [12] upon the exhibit. It may be received in evidence and marked Plaintiff's Exhibit 1.

The Clerk: Exhibit 1 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit 1.)

Southern California
Used Wooden
Agricultural Containers

PLAINTIFF'S EXHIBIT No. 1

Ceiling Price Regulation 142
APRIL 29, 1952

OFFICE OF PRICE STABILIZATION

WASHINGTON

TITLE 32A—NATIONAL DEFENSE,
APPENDIX

Chapter III—Office of Price Stabilization,
Economic Stabilization Agency
[Ceiling Price Regulation 142]

CPR 142—SOUTHERN CALIFORNIA USED
WOODEN AGRICULTURAL CONTAINERS

Pursuant to the Defense Production Act of 1950, as amended, Executive Order 10161 and Economic Stabilization Agency General Order No. 2, this Ceiling Price Regulation 142 is hereby issued

STATEMENT OF CONSIDERATIONS

This regulation establishes dollars and cents ceiling prices for used wooden agricultural containers sold in the area adjacent to the cities of Los Angeles and San Diego, California. Approximately 630 wholesalers-growers, packers and shippers of fruits and vegetables—sell their products to retail stores, restaurants, hotels, hospitals and similar organizations in that area. All of these latter organizations for the purpose of this regulation are classified as retailers. The food products are packaged in wooden or partially wooden containers and when their contents are sold to the retailers, title to the containers is transferred to them. No definite or specific price is charged for the package. After the contents are removed, the containers, in varying states of disrepair, are sold to used container dealers who maintain facilities to store, repair, recondition or rebuild them. There are approximately 127 used container dealers in the affected area.

The dealers purchase crates in small odd lots from a comparatively large number of retailers. They recondition the containers and accumulate them in their yards. They are sorted into by the sizes and types commonly used by the wholesalers of fruits and vegetables and are sold to them for re-use in the handling of those products.

Because of the seasonal nature of the fruit and vegetable business ceiling prices under the General Ceiling Price Regulation were established during a period of fewest sales, and proved to be inadequate for a large segment of the used container industry, particularly the used container dealers.

The General Ceiling Price Regulation level of prices created an unbalanced condition in the cost-price relationship between the three classes of persons involved in this industry in the Los Angeles and San Diego areas and has impeded the free flow of containers which normally exists.

Because of the inadequacy of price data for dealers during the GCPR base period, figures were obtained from cer-

tain fruit and vegetable wholesalers who purchased used containers from dealers. From these figures and from the data obtained from dealers, a level of GCPR base period prices for dealers was projected. This regulation establishes dealers' ceiling prices at a level approximately 18 percent above the projected GCPR base period price level when the differentiation in grades of containers is taken into consideration. The level of ceiling prices for retailers was then set to reflect the historical differences between retailers' and dealers' prices. The increase over the GCPR base period prices was necessary since December and January are off-season in the produce growing period and prices for used fruit and vegetable containers are at a seasonally low level.

The practice in the used fruit and vegetable container industry has been to classify containers into various groups, and size variations within the group are not given consideration in pricing the commodity. That practice has been followed in this regulation.

In the judgment of the Director of Price Stabilization, the ceiling prices established by this regulation are generally fair and equitable and are necessary to effectuate the purposes of Title IV of the Defense Production Act of 1950, as amended.

So far as practicable, the Director of Price Stabilization gave due consideration to the national effort to achieve maximum production in furtherance of the objectives of the Defense Production Act of 1950, as amended; to prices prevailing during the period from May 24, 1950 to June 24, 1950, inclusive, to those prevailing during the period January 25, 1951 through February 24, 1951, as well as the level of prices prevailing just before the issuance of this regulation; and to all relevant factors of general applicability.

In formulating this regulation, the Director has consulted with representatives of the industry, including trade association representatives, to the extent practicable under the circumstances and has given consideration to their recommendations.

REGULATORY PROVISIONS

- Sec.
1. What this regulation does.
 2. Ceiling prices for specified items.
 3. Ceiling prices for special containers, parts or services.
 4. Delivery charges.
 5. Records.
 6. Adjustable pricing.
 7. Petitions for amendment.
 8. Interpretations.
 9. Transfer of business of stock in trade.
 10. Prohibitions and violations.
 11. Evasion.
 12. Definitions.

AUTHORITY Sections 1 to 12 issued under sec 704, 64 Stat 816 as amended, 50 U S C App Sup 2154. Interpret or apply Title IV, 64 Stat 803, as amended, 50 U S C App Sup 2101-2110, E O 10161, Sept 9, 1950, 15 F R 6105, 3 CFR, 1950 Sup

SECTION 1. What this regulation does
(a) This regulation establishes dollars and cents ceiling prices for certain sales of used agricultural containers, constituent wooden parts thereof, when ready to be assembled into a container, and services supplied in connection with those containers. These ceiling prices apply to the transactions specified in paragraph (b) of this section.

(1) The term "agricultural container" means any box, crate, tray, lug, cup, hamper, basket, carrier or similar container made of wood, or a combination of wood, solid fibre or corrugated board customarily used for picking, handling, storing, or shipping, fruits, vegetables, and other farm products.

(2) Expressly excluded from the provisions of this regulation are coopered products, veneer drums, ply-wood drums, and containers made entirely of solid fibre or corrugated board.

(b) This regulation applies to sales of the products and connected services specified in paragraph (a) of this section made by retailers with business establishments in the California counties of Imperial, Inyo, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura. It also applies to sales of such products and connected services made by dealers with business establishments located in the counties listed.

(c) This regulation supercedes the General Ceiling Price Regulation with respect to the transactions covered.

Sec. 2 Ceiling prices for specified items
If you are a retailer or dealer in used agricultural containers, your ceiling prices, for used agricultural containers and extra parts, f. o b place of loading, and for services supplied in connection with them, are the following:

Item	Container	Name	Retailer, as a (each)	Dealer, grade 1 (each)	Dealer, grade 2 (each)
1	Peach	Flat	\$0.04	\$0.07	\$0.05
2	Avocado	Flat	\$0.04	\$0.07	\$0.05
3	Strawberry	Tray	\$0.04	\$0.07	\$0.05
4	Tomato	Flat	\$0.07	\$0.12	\$0.09
5	L A	Lug	\$0.07	\$0.12	\$0.09
6	Melon	Box	\$0.08	\$0.12	\$0.09
7	Tomato	4-box crate	\$0.04	\$0.09	\$0.06
8	Melon	Persian box	\$0.04	\$0.13	\$0.09
9	Apple	N. W. box	\$0.08	\$0.13	\$0.10
10	Apple	California box	\$0.08	\$0.13	\$0.10
11	Pear	Box	\$0.06	\$0.10	\$0.08
12	Lemon	Box	\$0.06	\$0.12	\$0.08
13	Orange and grapefruit	Crate	\$0.13	\$0.20	\$0.17
14	Celery	Sturdy box	\$0.08	\$0.13	\$0.10
15	Melon	Jumbo crate	\$0.06	\$0.18	\$0.12

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PLAINTIFFS' EXH. No. 1 CONT.

Name	Standard	Retailer's rate (each)	Dealer, grade 1 (each)	Dealer, grade 2 (each)
	Standard crate	\$0.06	\$0.18	\$0.10
	Pony crate	.06	.18	.10
	Crate	.06	.18	.10
	No. 1 crate	.13	.24	.15
	No. 2 crate	.13	.24	.15
	Crates	.06	.14	.10
	Box	.06	.10	.07
	Box	.06	.10	.07
			.03	
				.02
				.03

1. Additions by dealers for sanding crates at purchaser's request, may be as follows:

- through 3—2 cents each
- through 8—3 cents each
- through 14—4 cents each
- through 18—5 cents each

1 grade is a good, clean container, constructed from sound lumber and free from large knots, splits, checks, defects which will weaken the container from its good appearance. It will be no loose or broken slats, ends, and the parts shall be securely fastened. The container shall be clean with no stains or papers sanded off, and shall be a container for the purpose intended.

2 grade is a container with slight material construction or appearance which do not affect the use of the container as a package for the picking, storing, or shipping of fruits, and other farm products. The container need not be sanded.

1 grade and Number 2 grade containers usually require cleats, shall be nailed to the top of each end with the outside of the container lining over the inside to hold the cleats in place and to provide a means of fastening the container.

A charge may be made for the two containers which usually require ceiling price established by this may, however, be charged for extra fastenings to those containers, or fixed to containers which do not require them.

Ceiling prices for special contracts or services. (a) If you sell, in the manner specified in (b), any agricultural container, part or service covered by this regulation for which you cannot determine price under this regulation, you shall make application by mail, return receipt requested to the Los Angeles, California, or California, District Offices of Price Stabilization, for a complete description of the part or service, your proposed price, your method of arriving at the price, and the reasons why you propose the level of ceiling price established by this regulation. The ceiling price must be in the level of ceiling prices established by this regulation.

(b) You may not sell and deliver the container, part or service until a ceiling price has been approved by the Office of Price Stabilization. If the Office of Price Stabilization does not disapprove your proposed ceiling price within 20 days from receipt of your application, you may thereafter use your proposed ceiling price, subject to non-retroactive disapproval or modification at a later time, unless the Office of Price Stabilization requests further information. You shall supply the requested information by registered mail, return receipt requested. If the Office of Price Stabilization does not disapprove your proposed ceiling price within 20 days from receipt of the additional information, you may thereafter use your proposed ceiling price, subject to non-retroactive disapproval or modification at a later time.

Sec. 4. Delivery charges. If delivery is by common carrier or contract carrier the actual transportation costs paid or incurred by you may be added to the ceiling prices. If shipment is by truck owned or controlled by you, you may add to the ceiling prices transportation costs not in excess of the common carrier or contract carrier charge for a like shipment.

Sec. 5. Records. Every person who, in the manner specified in section 1 (b), sells used agricultural containers subject to this regulation shall make, keep, and preserve, and every person who in the regular course of trade or business buys used agricultural containers sold in the manner specified in section 1 (b) shall keep and preserve, for a period of two years after the date of each sale, for inspection by the Director of Price Stabilization, accurate records of each sale or purchase made after the effective date of this regulation. The records must show the date of the sale or purchase, the name and address of the seller and purchaser, and the price charged or paid, itemized by quantity and size. The records must indicate whether each purchase or sale is made on an f.o.b. or on a delivered basis, the shipping point, and transportation charges if any.

Sec. 6. Adjustable pricing. Nothing in this regulation prohibits you from making a contract or offer to sell at (a) the ceiling price in effect at the time of delivery, or (b) the lower of a fixed price or the ceiling price in effect at the time of delivery. You may not, however, sell or agree to deliver at a price to be adjusted upward in accordance with any increase in a ceiling price after delivery.

Sec. 7. Petitions for amendment. If you desire to have this regulation amended, you may file a petition for amendment, in accordance with the provisions of Price Procedural Regulation 1, Revised.

Sec. 8. Interpretations. If you want an official interpretation of this regulation, you should write to the District Counsel of the proper OPS District Office. Any action taken by you in reliance upon and in conformity with a written official interpretation will constitute action in good faith pursuant to this regulation. Further information on

obtaining official interpretations is contained in Price Procedural Regulation 1, Revised.

Sec. 9. Transfers of business or stock in trade. If a business, assets, or stock in trade are sold or otherwise transferred after the effective date of this regulation and the transferee carries on the business or continues to deal in the same type of commodity in an establishment previously owned or operated by him, the ceiling prices of the transferee shall be the same as those to which his transferor would have been subject, if no such transfer had taken place, and the transferee's obligation to keep records sufficient to verify such price shall be the same. The transferor shall either preserve and make available or turn over to the transferee all records of transactions prior to the transfer which are necessary to enable the transferee to comply with the provisions of this regulation.

Sec. 10. Prohibitions and violations.

(a) You shall not do any act prohibited or omit to do any act required by this regulation, nor shall you offer, solicit, attempt, or agree to do or omit to do any such acts. Specifically, but not in limitation of the above, you shall not, regardless of any contract or other obligation, sell and no person in the regular course of trade or business shall buy from you at a price higher than the ceiling prices established by this regulation, and you and buyers from you shall keep, make, and preserve true and accurate records and reports required by this regulation.

(b) If you violate any provisions of this regulation, you are subject to criminal penalties, enforcement action, and actions for damages. Prices lower than the ceiling prices may be charged, paid, or offered.

(c) If any person subject to this regulation fails to prepare or keep any record or file any report required by this regulation in connection with the establishment of his ceiling price, or if any person subject to this regulation fails to establish a ceiling price or apply to the Office of Price Stabilization for the establishment of a ceiling price, if he is required to do so, the Director of Price Stabilization may issue an order fixing his ceiling prices. Any ceiling price fixed in this manner will be in line with ceiling prices generally established by this regulation. The order fixing the ceiling price may apply to all deliveries or transfers completed prior to the date of issuance of the order. The issuance of such an order will not relieve the seller of his obligation to comply with the requirements of this regulation or of the various penalties for failure to do so.

Sec. 11. Evasions. Any means or device which results in obtaining indirectly a higher price than is permitted by this regulation, or in concealing or falsely representing information as to which this regulation requires records to be kept, is a violation of this regulation. This prohibition includes, but is not limited to, means or devices making use of commissions, services, cross-sales, trans-

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on arrangements, premiums, dis-
special privileges, up-grading,
agreements, and trade under-
ings, as well as the omission from
s of true data or the inclusion in
s of false data.

12. *Definitions.* This ceiling
regulation and the terms which
r in it shall be construed in the
ing manner, unless otherwise
required by the context. This
is defined in section 1 of this
ation.

Dealer. This term means a per-
who has facilities to store, repair, re-
tation or rebuild agricultural con-
s and who purchases them from
ers for resale.

Delivered. A commodity shall
emed to have been delivered if it
ceived by the purchaser or by any
er, including a carrier owned or con-
d by the seller, for shipment to the
haser.

(d) *Office of Price Stabilization.* This
term means the Director of Price Stabili-
zation and also applies to any official
(including officials of regional or district
offices) to whom the Director of Price
Stabilization delegates a function, power
or authority referred to in this regula-
tion.

(e) *Person.* This term includes any
individual, corporation, partnership, as-
sociation or any other organized group of
persons or legal successors or represen-
tatives of the foregoing, and the United
States or any other Government or their
political subdivisions or agencies.

(f) *Records.* This term means books
of accounts, sales lists, sales slips, orders,
vouchers, contracts, receipts, invoices,
bills of lading and other papers and doc-
uments.

(g) *Retailer.* This term means a per-
son who purchases fresh, canned or
dried fruits, vegetables, or other farm
products in agricultural containers,
empties the contents, and thereafter sells

the containers. It includes, but is not
limited to, grocery stores, canneries, res-
taurants, hotels, markets and institu-
tions. It does not include Army and
Navy establishments.

(h) *Sell.* This term includes sell,
supply, dispose, barter, exchange, trans-
fer and deliver, and also contracts and
offers to do any of the foregoing. The
term "buy" and "purchase" shall be con-
strued accordingly.

(i) *You.* The pronoun "you" as used
in this regulation means retailers and
dealers subject to this regulation.

Effective date. The effective date of
this regulation is May 5, 1952.

NOTE. The reporting and record-keeping
requirements of this regulation have been
approved by the Bureau of the Budget in
accordance with the Federal Reports Act of
1942.

ELLIS ARNALL,

Director of Price Stabilization.

APRIL 29, 1952.

PLAINTIFFS' EXH. No. 1 CONT.

(Testimony of Frank Alvarado.)

The Court: Now, will you read the question?

(Question read.)

The Witness: Yes, sir.

Q. (By Mr. Dooley): Are you familiar with the uses to which those types of containers are put?

A. Yes, sir.

Q. Will you tell the court just what uses, to what uses these containers are put?

Mr. Campbell: Objected to as calling for a conclusion of this witness, no proper foundation laid for this type of testimony.

The Court: Overruled.

The Witness: For produce.

Q. (By Mr. Dooley): Will you explain just what you mean by produce?

A. Fruit and vegetables.

The Court: You mean they are containers for fruits and vegetables?

The Witness: Yes, sir.

Q. (By Mr. Dooley): And to whom are those containers sold? [13]

The Witness: Well, we sell——

Mr. Campbell: Just a minute. I am going to object to that. What containers are you referring to?

The Court: Sustained as to whom. You might ask to whom he sells the containers. That is within his knowledge.

Q. (By Mr. Dooley): To whom do you sell the containers? A. We sell——

Mr. Campbell: Objected to as immaterial, what he sells to.

(Testimony of Frank Alvarado.)

The Court: Overruled.

The Witness: We sell to growers largely.

The Court: Are you in the wholesale or retail business?

The Witness: Wholesale.

The Court: And you sell in wholesale lots to growers?

The Witness: To growers, yes.

Q. (By Mr. Dooley): What do they do with these containers, if you know?

Mr. Campbell: Objected to, immaterial, calling for a conclusion of the witness.

The Court: Overruled. If you know how they use them, tell us.

The Witness: Produce. They put produce back in to bring them to the market.

Q. (By Mr. Dooley): You have testified that you have been in this business since 1936, I believe.

A. Yes, sir.

Q. Is there any other use you have seen these containers put to, types of containers in CPR 142, other than you have testified?

Mr. Campbell: Same objection, immaterial, incompetent.

The Court: Overruled.

The Witness: Well, there is a very small percentage my company sells for other uses. It would be hardly worth mentioning.

The Court: Do you sell any for any other use at all?

(Testimony of Frank Alvarado.)

The Witness: I don't know offhand. A very small amount, if any at all.

The Court: My understanding is you sell in wholesale lots to the growers.

The Witness: Yes, your Honor.

Q. (By Mr. Dooley): What do these growers do with the containers?

A. Well, we sell to them to put produce back in to bring to the market, and I believe that is what they do with them.

Mr. Dooley: No further questions.

The Court: Any cross examination?

Mr. Campbell: No questions.

The Court: You may step down.

(Witness excused.) [15]

Mr. Dooley: Your Honor, I believe it will be necessary to call each of the defendants under 43(b).

The Court: Well, you can call one of the defendants and it may be after one of the defendants has testified we can get a stipulation that the other defendants will, if called, give substantially the same testimony. Have you got one in mind that you would like to call?

Mr. Dooley: Let's take the No. 1 defendant, Mr. Dix.

The Court: All right.

Mr. Dooley: Mr. Dix, will you take the stand?

BENJAMIN DIX

one of the defendants herein, having been first duly sworn, was called as a witness under Rule 43(b) and testified as follows:

The Clerk: State your name, sir.

The Witness: Benjamin Dix.

Mr. Campbell: This witness is being called pursuant to 43(b).

Mr. Dooley: Yes.

Direct Examination

Q. (By Mr. Dooley): Mr. Dix, you are with the Dix Box Company, are you not? [16]

A. Right.

Q. Where is that company located?

A. 1023 East 14th Street, Los Angeles.

Q. Is that in California? A. California.

Q. You are a partner in that company, are you not? A. Right.

Q. And you sell wooden agricultural containers, do you not? A. Right.

The Court: Do you sell anything other than agricultural containers?

The Witness: We sell—the containers we sell were originally derived from agriculture.

Mr. Campbell: May I have that answer read?

(Answer read.)

The Court: Do you sell them wholesale or retail?

The Witness: Wholesale.

The Court: To whom do you sell them, usually?

The Witness: Well, we are not particular. We will sell them to anybody that has got money to

(Testimony of Benjamin Dix.)

pay for them, truckers, farmers, to a wholesaler, to a fellow that wants to put shelves on his wall.

The Court: Do you sell them to anybody for any purpose?

The Witness: Yes. [17]

Q. (By Mr. Dooley): I show you Plaintiff's Exhibit No. 1 in evidence and call your attention to Section 2 of this exhibit and ask you if the types of containers enumerated thereon are the types of containers sold by your company.

A. Specifically sold?

Q. Does your company sell any or all of those types of containers?

A. Well, can we go a little further with that? Sell them on the basis that these are outlined here?

The Court: No, that is not the question. Just containers. Do you deal in that kind of containers?

The Witness: Yes, we do.

The Court: You buy them and sell them?

The Witness: Yes, your Honor.

Q. (By Mr. Dooley): To whom do you sell these containers principally?

A. Well, like I said before, to anybody that will pay for them.

Q. How long have you been in the business?

A. Since 1947 in California.

Q. 1947. Isn't it true that you sell them to growers?

A. They are part of our customers.

Q. What part would you say?

A. That would be hard to say right now.

The Court: May I ask a question of this witness?

(Testimony of Benjamin Dix.)

Mr. Dooley: Certainly.

The Court: When a party comes up to buy containers, do you say, "Are you a grower or trucker or a businessman?"

The Witness: No, I don't, your Honor. A man comes in and wants to buy some lugs. I don't particularly care what he uses them for. If he wants to buy some of those lugs——

The Court: Do you require them to give a statement of the business they are in?

The Witness: No, sir.

The Court: Or what they are going to use the lugs for or the containers?

The Witness: No, sir, we don't.

Q. (By Mr. Dooley): You have been in this business since 1947. Do you know who your customers are? A. A good part, yes.

Q. Do you know whether your customers are growers, packers, or wholesalers?

A. They would be a combination.

Q. Do you know what business the packers are in?

A. Packers—it is an involved business. One man can buy boxes and then turn around and sell them——

Q. Will you answer the question?

Mr. Campbell: Let him answer the question.

The Court: Read the question.

(Question read.) [19]

The Court: You can answer that yes or no. Well, let's start all over again. Let me ask this witness a question or two.

(Testimony of Benjamin Dix.)

Mr. Dooley: Certainly.

The Court: Do you sell them to other wholesalers?

The Witness: Yes, sir.

The Court: I understand you are in the wholesale business.

The Witness: Yes, your Honor.

The Court: You do sell to other wholesalers?

The Witness: Yes, your Honor.

The Court: Do you sell for cash or credit?

The Witness: Both ways.

The Court: Do you keep any record to indicate the business the purchasers are in?

The Witness: No, your Honor.

The Court: You have no control over the containers after they leave your place of business?

The Witness: No, your Honor.

The Court: You sell them at your place of business?

The Witness: Yes, your Honor.

The Court: You load them onto a truck or conveyance of some kind and——

The Witness: And then it becomes their property.

The Court: Do you know what happens to them after they [20] leave your place?

The Witness: No, your Honor.

Mr. Campbell: Might I state, your Honor, so far as the names of the individuals or firms to whom he has sold, he has produced pursuant to subpoena all of the records and invoices with respect to sales during the period May 5, 1952, to January 31, 1953.

(Testimony of Benjamin Dix.)

His records are here at the request of the United States Attorney. I wish the record to show he has so produced those records.

The Court: The record may so show. Now, you make a sales slip on every sale, do you not?

The Witness: Yes, your Honor.

The Court: And you keep that in your records?

The Witness: Yes, your Honor.

The Court: It shows the name of the purchaser?

The Witness: Yes, your Honor.

The Court: Does it show his address?

The Witness: Mostly not.

The Court: Does it show his business?

The Witness: No, sir.

The Court: It shows the quantity?

The Witness: It shows the quantity.

The Court: And it shows the price?

The Witness: And the price.

The Court: Does it show anything else? [21]

The Witness: The date, the quantity, the price, and by whom they were transported.

The Court: Do you mean by that by whom they were actually transported or by whom they were sold?

The Witness: The name of the person, the name of the company that actually transported the merchandise, and the name of the individual that is going to pay for the merchandise. In many cases we will sell them to a person who will never use them. Mostly it is that way. He will in turn distribute them to other people.

(Testimony of Benjamin Dix.)

Q. (By Mr. Dooley): You stated you sold——

The Court: Mr. Dooley, may I ask another question here?

Mr. Dooley: Yes, your Honor.

The Court: Is the government interested at all in second-hand containers if they are not sold and used in agriculture? In other words, if a container was sold to somebody to carry coal in, for instance, would the government have any control as to the price?

Mr. Dooley: The government would have control under any circumstances. This is a question that the defendant raised in his motion to dismiss.

The Court: Don't you pay any attention to what the defendants' defenses are going to be. You pay attention to what your case is going to be. You establish your case and let the defendant establish his case. [22]

Mr. Dooley: The government has to establish one of two things in this instance. It happens that we pleaded one. The government has to establish that the purchasers have not brought suit within 30 days from the date of purchase——

The Court: Well, that is a defense. If the defendants can show that any suit has been filed by the purchasers, it can be established by the defendants and the court will rule upon it. You don't have to meet that issue at all.

Mr. Dooley: No, your Honor. This is an alternative. We have to establish one or the other. Or, if the court please, if the court permits his amend-

(Testimony of Benjamin Dix.)

ment, and I think there is enough evidence in the stipulation to show they haven't brought suit, so it wouldn't be necessary——

The Court: That is out of the picture. I am not interested in that defense at all. It is a defense. They can plead it, if they want to, but the burden is upon them to establish it.

Mr. Campbell: We do not take the position that is a defense, and we take the position under the statute that is a necessary prerequisite to the government bringing suit.

The Court: I disagree with you and I will overrule your contention.

Mr. Campbell: I understand.

The Court: Here is what I am interested in. This regulation 142 was made to control the price of agricultural containers. [23] Supposing that agricultural containers were sold for other purposes? Does the regulation apply?

Mr. Dooley: Well, I think it does, your Honor.

The Court: Where is your authority? Supposing that this defendant would sell 1,000 boxes to a manufacturing plant for the purpose of making bins for the keeping of bolts and nuts and screws, and so forth? Suppose he sold them 5 cents over the market? Could the government complain?

Mr. Dooley: I think it could. I mean I think the defendant—I was going to ask the defendant a question. I think the defendant will state that most of the containers——

The Court: Let me see that Exhibit 1. It says

(Testimony of Benjamin Dix.)

here this regulation establishes dollars and cents ceiling price for used wooden agricultural containers sold in the area. It doesn't say anything about the use. It doesn't say anything about purchase. All it says is if the agricultural containers are sold.

Mr. Dooley: Your Honor, that is in the statute we are trying to comply with, 2901(c) of 50 USCA Appendix.

The Court: Let me ask the attorney for the defendants, how are you going to get around this provision that this concerns the agricultural containers sold? Does it make any difference what happens to them after they are sold?

Mr. Campbell: The statute is clear and the regulation is clear that they are agricultural containers and that is all [24] it applies to. We admit we sold so many boxes of a certain description at a certain price in that period.

The Court: This man deals in agricultural containers. Do you deal in anything other than agricultural containers?

The Witness: No, your Honor.

The Court: So he sells agricultural containers.

Mr. Campbell: But he doesn't know the use they are put to.

The Court: I don't think the use makes any difference. If it said "agricultural containers sold and used," it would make a lot of difference, or if it said, "agricultural containers used in the area," it would make a difference, but the regulation says "sold."

(Testimony of Benjamin Dix.)

Mr. Campbell: Are we possibly confusing terms? I think the term "agricultural container" refers to a container used for agricultural purposes. He is dealing in boxes.

The Court: No. Your own witness has just testified he doesn't sell anything but agricultural containers.

Mr. Campbell: May I ask him a question on voir dire?

The Court: Yes.

Voir Dire Examination

Q. (By Mr. Campbell): You say you sell agricultural containers. By that do you refer to certain types of boxes and crates and flats? [25]

A. Yes.

Q. Do you know yourself what use they are put to after they leave your yard?

A. We have no idea.

Q. You don't know whether the person purchasing them stores or packs or keeps agricultural products in them?

A. No idea at all.

Q. You do know some of the boxes which you sell are sold for other than agricultural purposes?

A. Yes, I do.

Q. As a matter of fact, some are sold in the poultry industry?

A. Definitely.

Q. Quite a large number?

Mr. Dooley: Your Honor, this should be gone into after the plaintiff finishes with the witness.

The Court: This is on voir dire to find out what

(Testimony of Benjamin Dix.)

is meant by the word "sold." Suppose you have an orange crate. Everybody knows what an orange crate is. Suppose it is sold to a chicken man. Suppose this defendant knows it. However, he is selling an orange crate which is an agricultural box.

Mr. Campbell: It is an agricultural box if used in the industry of agriculture.

The Court: That isn't what it says.

Mr. Campbell: If you visit most of the mountain and seashore [26] cabins in Southern California, you will find the variety of uses for those boxes we term orange boxes, but they no longer retain their character as orange boxes except for the purpose of identification.

The Court: It doesn't make any difference. All that is necessary is to establish that they are wooden agricultural containers and they are sold. What happens to them after that, I don't think makes any difference. This defendant has said he deals in agricultural containers, and he sells agricultural containers.

Mr. Campbell: The statute makes a distinction as to whether they are used in trade or business or not.

The Court: Where does it make a distinction? What book have you got there?

Mr. Campbell: Title 50 Appendix, Section 2109.

The Court: Wait a minute. 50 Appendix, 2109?

Mr. Campbell: That is the Defense Production Act of 1950.

(Testimony of Benjamin Dix.)

The Court: Let me get my volume here and let me see what the statute says.

Mr. Campbell: That is a section, your Honor, which provides the instances in which the government may proceed with a suit to collect alleged overcharges.

The Court: Here is the situation we have got here. Is the government going to be required, not only to establish [27] not only that this defendant dealt in agricultural containers, sold agricultural containers, but is the government going to have to go one step further and prove they were used in agriculture?

Mr. Campbell: I believe so, and apparently the government believes so, also.

The Court: You mean they will have to chase down every last one of these sales and determine whether or not they were used in agriculture?

Mr. Dooly: The government says this, your Honor, that we have to prove the alternative, either that the purchasers haven't brought suit within 30 days, or they were purchased in the course of their trade or business. The defendants in their stipulation——

The Court: This defendant has just testified he sold them. He hasn't testified he didn't sell them in the course of his business. He sold merchandise. The thing I am interested in is whether or not you are going to have to establish that the merchandise that was sold was used in agriculture.

Mr. Dooley: No.

(Testimony of Benjamin Dix.)

The Court: Just a minute. I have got Section 2109.

Mr. Campbell: Section C, your Honor, recovery of overcharges by buyer.

The Court: Where does it say anything about the use of the agricultural containers? [28]

Mr. Campbell: The first sentence of C.

The Court: If any person sells any materials or services and violates a regulation or order prescribing a ceiling or ceilings——

Mr. Campbell: The person who buys such material or service may within one year bring an action for the overcharge.

The Court: That says people may bring an action.

Mr. Campbell: Then if you will go down to the following two sentences, you will see the President as such only has the right to sue under the instance set forth in the statute. Aside from the statute, the President has no right as far as these defendants are concerned to institute an action in his own name or in the name of the United States.

The Court: Have you got any cases that say that the government has to establish the fact that these boxes were used in agriculture?

Mr. Campbell: I have the authority which I quoted to your Honor in my motion to dismiss where the point was raised that the government complaint was fatally defective by reason of failure to assert these prerequisites. In that case, however, the court found the saving language in the com-

(Testimony of Benjamin Dix.)

plaint, the general allegation that the government had complied with all the regulations required, and therefore saved the complaint. However, it is indicative of the fact that without that saving language, which is not present in this case, that the complaint [29] would have been found fatally defective. That is the only case I have found one way or the other on this matter of pleading, aside from the language set forth in the statute to which I have called your attention.

The Court: I am going to hold it is only necessary for the government to establish the fact that the wooden agricultural containers were sold, and after they were sold and delivered, I am not interested in what happened to them.

Mr. Campbell: May an exception be noted?

The Court: You can have an exception, and the government will have an exception also.

Mr. Dooley: I would like then, your Honor, to amend the complaint as indicated in my opposition to defendant's motion.

The Court: Suppose you wait until the end of the evidence and then you can move to amend. You may have some more amendments you want to make.

Mr. Dooley: May I finish with this witness?

The Court: Yes.

Direct Examination—(Resumed)

Q. (By Mr. Dooley): You stated, Mr. Dix, you sold to growers, wholesalers and packers and so on?

(Testimony of Benjamin Dix.)

A. Yes.

Q. You also stated you have been in business since 1947? [30]

A. That's right.

Q. Will you tell the court what packers do?

The Court: If there is an objection to that, I will sustain the objection. It is immaterial. It doesn't make any difference what the packers do with these boxes. The only question is, were they sold? Were they agricultural containers and were they sold? This witness says they are agricultural containers and they were sold. That is all. So in the absence of defendants objecting, I will object. The question is immaterial as far as I am concerned, in these cases.

Mr. Dooley: No further questions, your Honor.

The Court: Any questions?

Mr. Campbell: No, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Now, can we have a stipulation if all the rest of the defendants were called, that their testimony would be substantially the same relative to the dealing in agricultural boxes and selling to anybody that comes along?

Mr. Campbell: We can so stipulate.

Mr. Dooley: I won't agree, because I didn't get an opportunity to cross examine the witness on that.

Mr. Campbell: He was your witness.

The Court: You called him under the statute for cross [31] examination.

Mr. Dooley: But the court said the question was

immaterial and the government takes exception to that very much for the simple reason if he testifies what the packers do, that they take these crates and put fruits and vegetables in them and ship them, the inference will follow that the packers purchased the containers in the course of their trade or business, and also if he testifies the growers do, the inference follows that they purchased them in the course of their trade or business.

The Court: Mr. Dooley, assume that you are engaged in the business of dealing in second-hand agricultural containers. You have a place of business out here on Olympic Boulevard. You have a lot of boxes and containers on display. A fellow comes up and says, "I want to buy 1,000 potato crates. Have you got them?"

You say, "Yes."

"How much do you want for them?"

You give him the price.

He says, "Put them on the truck."

Do you say to him, "Oh, no, I can't put them on the truck. I want to know what you use these for, where you are going to take them"?

Mr. Dooley: But Mr. Alvarado, the plaintiff's first witness, is in the same business these defendants are in, and he [32] testified to what was done, who he sold to, and he said only a very slight percentage could possibly be used for any other purpose but for fruits and vegetables.

Mr. Campbell: That is his business.

The Court: I have bought a lot of oranges and grapefruit in my time, and I have a lot of shelves

made of orange and grapefruit boxes. They make good shelves.

Mr. Dooley: If your Honor please, may I recall the witness and ask him with regard to percentages?

The Court: Yes, you can recall the witness, if you want to. You don't have to bring back your records, Mr. Dix, but just come back to the stand.

BENJAMIN DIX

one of the defendants herein, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Dooley): You are a partner in this Dix Box Company, are you not?

A. That's right.

Q. What percentage of your sales would you say is made to packers?

A. I have no way of knowing.

Q. You don't check your records? [33]

A. No, sir, I don't.

Q. You are not familiar in any way with your customers?

A. I know who my customers are, but what they do with them, I have no way of knowing.

Q. Do you know your largest customers?

A. Yes, I know all my customers.

Q. What business are they engaged in?

A. Well, primarily, my largest customers are in the business of hauling, he is in the trucking business.

(Testimony of Benjamin Dix.)

Q. What do they do?

A. He trucks boxes, he trucks merchandise, anything that somebody wants him to haul.

Q. You will note from the types of containers that you looked at a few moments ago, it says peach trays, and so forth. Are you familiar with the purpose of those boxes?

A. Not peach trays. We don't sell them.

Q. May I see Plaintiff's Exhibit 1? Peach flats.

A. There is no peach flat. We don't sell a peach flat. We don't distinguish them that way.

Q. You stated a few moments ago you sold different types of containers.

A. I said we sold some of the types.

Q. Not all? A. Not all.

Q. Do you sell avocado flats? [34]

A. We do.

Q. Are you familiar with the use of avocado flats?

A. I am familiar with what it was designed for.

Q. What was it designed for originally?

A. Brand new, it was designed for avocados.

Q. When you get these containers used, what do you do with the boxes?

A. We recondition them and sell them.

Q. Do you sell tomato flats?

A. Yes, we do.

The Court: Can't you stipulate that the containers that were sold were originally used in agriculture?

Mr. Campbell: I presume they were.

(Testimony of Benjamin Dix.)

The Court: Do you handle any boxes and crates that were not originally designed for agricultural use?

Mr. Campbell: I will stipulate that they were all designed for agricultural use, yes, your Honor.

The Witness: We do have exceptions. We will sometimes sell fish boxes.

The Court: You handle fish boxes, too?

The Witness: Yes, if somebody will sell and at a price we can afford to buy at, we buy them.

The Court: Is there a ceiling on fish boxes?

Mr. Dooley: Well, there may have been, your Honor, but it is not covered by the Regulation 142.

The Court: Do you ever get any boxes, second-hand boxes as far as traveling from place to place, but were never used?

The Witness: Do we ever get boxes that were never used?

The Court: Never used.

The Witness: We have on occasion, yes, your Honor.

The Court: I assume these purchasers will get boxes that were never used. They were designed for agricultural use and yet for some reason they get into a warehouse somewhere and were never used and then they are sold to a second-hand box place. I think the stipulation is that the merchandise that was handled by this defendant and the rest of these defendants was originally designed for agricultural use?

(Testimony of Benjamin Dix.)

Mr. Campbell: Yes, with the exception of fish boxes.

The Court: Yes.

Mr. Campbell: Generally speaking, their business was handling used containers designed for agricultural uses.

Q. (By Mr. Dooley): And the picture of the situation is this. Those boxes travel in a cycle and the retailers sell them to the dealers, the dealers recondition them, and sell them back to the farmer or packer and they fill them up again with fruits and vegetables and sell them to the retailers, isn't that true? A. I didn't follow you.

Q. Didn't those used agricultural containers travel in a cycle? You sold them to the farmers, wholesalers, packers, [36] and the packers sold to the retailers, grocery stores, markets, and so forth, and the grocery stores and markets sold them back to you and you reconditioned them and sold them again? A. It didn't follow that cycle.

Q. How did it function?

A. It is a very complicated affair. It could be a hundred ways.

Q. Enumerate them.

A. Well, the packer wouldn't sell to the retailer.

The Court: Let's assume that the manufacturer manufactures a lot of these boxes for agricultural use. He sells them to wholesalers somewhere or to a packer or to a large farm, puts them into trade.

The Witness: That could be one of the methods.

(Testimony of Benjamin Dix.)

The Court: Then they are filled with agricultural products, and after they are filled with agricultural products, they probably go to a wholesaler and the wholesaler sells them back to the retailer.

The Witness: That would be one method.

The Court: The retailer sells to the general public, and when he gets through, he has an empty agricultural container. He takes the container and sells it to a box company, isn't that right?

The Witness: That is one of the methods.

The Court: And then the box company reconditions them [37] and puts them back into where it can be used again and filled with agricultural products, and it will gradually come back to the store and be emptied of the agricultural product.

The Witness: That is one of the methods.

The Court: What other method is there?

The Witness: We will sell boxes to one man and he will turn around and sell them to another man, who will turn around and sell them to a third or fourth party.

The Court: That is true, but it eventually comes back to the agricultural field where it is filled with produce?

The Witness: At least part of it.

The Court: At least part of it.

The Witness: At least part of it.

The Court: There is always a mortality, isn't there, just from being banged up and destroyed?

The Witness: Yes.

(Testimony of Benjamin Dix.)

The Court: All right.

Mr. Dooley: No further questions.

(Witness withdrawn.)

The Court: Mr. Dooley, are you willing to accept the stipulation that all of these defendants will testify substantially the same as the witness who has left the stand?

Mr. Dooley: I would like to call one more of the defendants, your Honor. [38]

The Court: Well, it is pretty near 11:00 o'clock. Before you call the next witness, we will take our morning recess.

Mr. Campbell: Maybe Mr. Dooley can indicate who is the next victim.

Mr. Dooley: I prefer not to, your Honor.

The Court: We will recess until 5 minutes after 11:00.

(Recess.)

Mr. Dooley: Your Honor, Mr. Alvarado has an appointment and I wonder if your Honor intends to recall him.

Mr. Campbell: I have no objection to letting him go.

Mr. Dooley: Then may the witness be excused?

The Court: He may be excused.

Mr. Dooley: Thank you.

The Court: Call your next witness.

Mr. Dooley: The plaintiff calls David Savetnick.

DAVID SAVETNICK

called as a witness herein under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: David Savetnick.

The Clerk: Spell the last name.

The Witness: S-a-v-e-t-n-i-c-k. [39]

Direct Examination

Q. (By Mr. Dooley): Mr. Savetnick, you are with the Produce Box and Crate Company, are you not? A. Yes, sir.

Q. Where is that located?

A. 767 Ceres Avenue, Los Angeles, California.

Q. You are the owner of that company, are you not? A. Yes, sir.

Q. How long have you been in the business?

A. About 10 years.

Q. About 10 years? A. Yes, sir.

Q. What is your business?

A. Produce containers.

The Court: That is, you sell second-hand?

The Witness: Yes, sir.

The Court: Do you sell any new?

The Witness: Not likely.

Mr. Campbell: I can't hear you.

The Witness: No, sir, just used.

Q. (By Mr. Dooley): Is it not true, Mr. Savetnick, that your principal purchasers are growers, packers and wholesalers?

A. Yes, sir, with some exceptions. [40]

(Testimony of David Savetnick.)

Q. What percentage are the exceptions?

A. Well, it is difficult to state exactly.

Q. What would you say?

A. Oh, sometimes it varies. Maybe 5, maybe 10, maybe less, maybe more. It is rather difficult to be specific.

The Court: What is the exception?

The Witness: For instance, your Honor, at certain times I sell boxes to a man that has a book shop and he uses those boxes for shelves. At other times we sell them to poultry people. Those are the exceptions, your Honor.

Q. (By Mr. Dooley): But you always sell to persons in business, is that correct?

A. Yes, sir.

Q. You don't sell to any other persons other than those in business?

A. Other than what I stated, with some exceptions. We sell to other people. If a man comes in and wants to buy a certain amount of boxes legitimately, I wouldn't think of refusing to sell those boxes.

Q. You sell them in wholesale lots, do you not?

A. Yes, sir.

Q. You stated that generally at least 85 per cent of your boxes are sold to wholesalers, growers and packers.

A. Yes, sir.

Q. What do wholesalers do, Mr. Savetnick? [41]

The Court: Just a minute. Are you asking what the wholesalers do who sell boxes?

Mr. Dooley: No, who purchase boxes.

(Testimony of David Savetnick.)

Mr. Campbell: That is objected to as calling for a conclusion.

The Court: Sustained. He can testify to what he does. He may be able to testify as to what wholesalers do when they sell second-hand containers, but when he steps out of the picture and says what other wholesalers do, he is not qualified to testify.

Mr. Dooley: If your Honor please, may I lay a foundation?

The Court: Yes.

Q. (By Mr. Dooley): You stated you have been in the business about 10 years, did you not?

A. Yes, sir.

Q. Are you familiar with the industry?

A. Yes, sir, as far as my knowledge allows me.

The Court: Mr. Witness, will you take your hand down from your mouth and speak up loudly so we can hear you?

The Witness: Yes, sir.

Q. (By Mr. Dooley): You are familiar with the industry? A. Yes, sir.

Q. Do you know generally what kind of business packers, wholesalers and growers are in?

Mr. Campbell: That is objected to. [42]

The Court: Maybe I can get a stipulation from the opposing side. I think the opposing side will stipulate that certain boxes and containers are used on the farms by agriculture for the containing of agricultural products. I think opposing counsel will stipulate that there are certain packing companies or packing sheds that pack agricultural

(Testimony of David Savetnick.)

products, and that these packing sheds or packers use containers to put agricultural products in.

Will you stipulate that?

Mr. Campbell: Yes, I will stipulate that.

Mr. Dooley: No further questions, your Honor.

Mr. Campbell: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Dooley: Now, your Honor——

The Court: Before we go any further, I want counsel to stipulate that if all defendants in this case were called to testify, they would testify substantially the same as the two who have already testified.

Mr. Campbell: So stipulated.

The Court: That is, they are engaged in the business of selling wholesale second-hand agricultural products, that they sell to parties who come to a place of business to buy, and that they deliver their products to the truckers, they don't [43] deliver their products by themselves, but they deliver the products at their place of business.

Mr. Campbell: With one exception, your Honor. Your Honor stated they do not deliver merchandise themselves. That is not true in all instances.

The Court: Do some of them?

Mr. Campbell: Yes. Some of the boxes listed in the complaint are listed as having been delivered and allowances made in some instances for the delivery of the boxes, but I will gladly stipulate that the other witnesses will testify that they are in the

business of purchasing, reconditioning where necessary, and re-selling boxes or containers used in the pursuits of agriculture.

The Court: All right. Mr. Dooley, I want you to stipulate that the boxes are sold to anybody that comes around, that there is no inquiry made by the seller as to the use the boxes are going to be put to, and the sellers do not know what uses the boxes are put to after they leave their place of business.

Mr. Dooley: I will have to refrain, your Honor, from stipulating that. I will stipulate as the last witness testified.

The Court: I think it is immaterial.

Mr. Dooley: I honestly don't believe, your Honor, that they don't know. The question I asked as to what the packers [44] do, this last witness testified only 5 or 10 or maybe a little more percentage of his boxes were not sold to packers, growers and wholesalers. I honestly can't say that they have dealt for 10 years in that particular business and have no idea as to what packers, wholesalers and growers do.

Mr. Campbell: I will stipulate packers, growers and wholesalers of agricultural products produce, pack and ship and sell agricultural products.

Mr. Dooley: And will you also stipulate, as the last witness testified, that only between 5 or 10 or maybe a little more percentage of all containers were not sold——

Mr. Campbell: I cannot stipulate to that. I don't know the percentage of each one of them. They are selling to those who are engaged in the

business of packing, growing and wholesaling, but they don't know what actual use the boxes are put to after they leave their yard.

Mr. Dooley: I can't stipulate that they don't know the use.

The Court: Mr. Dooley, how would they know unless they followed the boxes themselves? They know, I suppose, if they sell to a packing house, they assume that the containers are going to be used by that packing house in which to put agricultural products. They don't know it unless they follow the boxes and see them being used.

Mr. Dooley: I will stipulate to this. They may not know [45] in any specific instance, but they know generally what boxes are used for by packers.

The Court: If you go down to an automobile concern and buy an automobile, the automobile concern will deliver the automobile. Can they testify as to what use you put that automobile to unless they go out and follow the automobile and see it used?

Mr. Dooley: No, not in a specific instance. The difficulty in proving a particular point like that, I was proving what was generally done in the industry, who they principally sold to. The stipulation contended that they principally sell to packers, wholesalers and growers.

The Court: Mr. Dooley, I don't want to restrict you in any way in proving your case. So you can call your next witness.

Mr. Dooley: It will be rather repetitious. It will be the same witnesses on the same points.

The Court: You have got a stipulation all these defendants will testify substantially the same way.

Mr. Dooley: As the last defendant, and I will accept that stipulation.

Mr. Campbell: I will stipulate they will all testify substantially the same as these two witnesses.

Mr. Dooley: The last witness?

Mr. Campbell: In other words, they sell to whoever comes [46] in. Generally speaking, they know these people as being in the business, growing, packing and wholesaling vegetables. What use the boxes are put to after they leave their place, they have no way of knowing. Like this last man, he sells to a book dealer and he knows they aren't going into agricultural use.

Mr. Dooley: I will stipulate they don't know in any specific instance definitely, but they know generally that they sell to packers, wholesalers and growers.

Mr. Campbell: I think our general stipulation covers that. The others are really substantially the same as these two gentlemen.

The Court: Mr. Dooley, if you are not willing to accept that stipulation, call your next witness. We have got two days, but I will insist the case be completed tomorrow. If you want to call another one of these defendants, call him.

Mr. Dooley: I will try one more, your Honor.

The Court: All right. Which one do you want to try now?

Mr. Dooley: I will call Mr. Simonian.

Mr. Campbell: Also under 43(b)?

Mr. Dooley: Yes. [47]

HARRY SIMONIAN

one of the defendants herein, called as a witness by the government under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Harry Simonian.

The Clerk: Please spell your last name.

The Witness: S-i-m-o-n-i-a-n.

The Court: You will have to speak up so we can hear you.

Mr. Campbell: May the record show this witness, as well as the last witness called, Mr. Savetnick, have produced here the records of their sales of boxes for the period May 5, 1952, to January 31, 1953, as required by the United States Attorney.

The Court: The record may so show.

Mr. Campbell: Do you have those records with you, Mr. Simonian?

The Witness: Yes.

Mr. Dooley: Do you have them on the stand?

The Court: Are you going to ask him about his records?

Mr. Dooley: It slipped my mind, your Honor. I intended to cross examine on those records. If your Honor please, I may recall the other two.

The Court: I don't think I am going to allow you to go through these records in court. You have had plenty of opportunity on discovery to determine what these records are. If you [48] have got

(Testimony of Harry Simonian.)

some notice here of some of these records you want to look at, all right, but just to say generally, no. You go ahead and examine this witness.

Mr. Dooley: All right, your Honor.

The Court: This is cross examination. You can ask him about any specific bit of evidence he has got here, but I am not going to let you go on a fishing expedition. If you have got something definite, all right.

Mr. Campbell: For the record, your Honor, may I state that the witness has produced here a small suitcase full of records which contain for the period indicated both statements and invoices purporting to show the sale of boxes, to whom sold, the quantities of each box sold on the given date, and the type of box.

The Court: May I ask this witness a question?

Mr. Campbell: Certainly.

The Court: Do these records show what purpose the boxes were going to be used for?

The Witness: Yes, sir.

The Court: That is shown?

Mr. Campbell: I don't think he understood your question.

The Court: These records you have show the name to whom the boxes were sold?

The Witness: Yes, sir.

The Court: Do they show what use the boxes were to be [49] put to?

The Witness: I don't know. I didn't take the boxes. I don't know what he put in them.

(Testimony of Harry Simonian.)

The Court: Do you know what goes into the boxes after you sell them?

The Witness: I don't know. They go to a farmer.

The Court: But you don't know what goes into the boxes?

The Witness: I don't know what is going into the boxes, fruit and vegetables.

The Court: Do you sell to farmers?

The Witness: I sell farmers.

The Court: You can cross examine, if you want.

Direct Examination

Q. (By Mr. Dooley): Mr. Simonian, you are with the Simonian Crate Company, are you not?

A. Yes, sir.

Q. Where is that? A. 836 Naomi.

Q. Is that in Los Angeles, California?

A. Yes, sir.

Q. How long have you been in that business?

A. I started 1936.

Q. How long have you been in that business?

A. I start 1936 in business.

Q. Are you familiar with the use to which the containers which you sell are put?

A. Well, only boxes. I can't understand you.

Mr. Campbell: You will have to keep your voice up. He can't hear you.

The Witness: What did he say? I don't know.

The Court: He has already testified he sold them to farmers for agricultural products to be put in them.

(Testimony of Harry Simonian.)

Mr. Dooley: I am sorry, your Honor.

Q. That refers to all the boxes that you sell?

A. Yes, all boxes.

Mr. Dooley: No further questions.

Mr. Campbell: May I ask one or two questions, your Honor?

The Court: Yes.

Cross Examination

Q. (By Mr. Campbell): Mr. Simonian, I noticed in looking at the records you produced here, you sell some boxes to other box companies?

A. Sometimes, yes.

Q. That is indicated by the records you have here, isn't that correct? A. Yes. [51]

Q. You don't sell entirely to farmers?

A. No.

Q. As a matter of fact, other than what these people buying from you tell you about it, do you know what they do with the boxes after they leave your place?

A. Well, take them to the farmer and put in the fruits and vegetables.

Q. Do you know that? A. Yes.

Q. Do you go there and see the boxes?

A. I don't go. I don't know what they put them in.

Q. You don't know what?

A. They take them to the truck and load them up and take them to the farmer.

(Testimony of Harry Simonian.)

Q. That is the last you see of the boxes, when they are loaded up at your place of business?

A. Yes.

Q. In some instances, you deliver the boxes to the purchasers direct?

A. Sometimes I deliver to farmer, you know, and then I know what he is going to put in, the fruit.

Q. But you don't see this fruit there?

A. I don't see.

Q. You don't know what the other box companies do with the boxes they buy? [52]

A. The same thing.

Q. They take them away from your yard and that is the last you see of the boxes?

A. Yes.

Q. Any knowledge you have on that is what you guess they do, isn't it?

A. Yes.

Mr. Campbell: That's all.

Redirect Examination

Q. (By Mr. Dooley): Mr. Simonian, you are relatively sure from your experience in the field that they do put fruits and vegetables in them?

Mr. Campbell: Objected to as argumentative.

The Court: Sustained.

In one of these you have A-1 Stores. What is that?

The Witness: That is a produce market.

The Court: A produce market?

The Witness: In Los Angeles.

(Testimony of Harry Simonian.)

The Court: You sell some boxes to markets?

The Witness: I sell them over there because sometimes his boxes broke and he take mine and put them in, some parts come out, broken inside, and he take my stock and put in some stuff. [53]

Mr. Campbell: May I ask one question to clarify that last?

The Court: Yes.

Mr. Campbell: That store is a wholesale seller in the produce market here?

The Witness: Yes.

Mr. Campbell: Is that correct?

The Witness: Yes.

Mr. Campbell: They are a wholesaler down in the produce market?

The Witness: Yes.

The Court: I notice you have got another market, Market Town No. 2.

The Witness: I buy merchandise, I think, from over there.

The Court: You buy some?

The Witness: I don't know which one is it? Is it Market Town in Los Angeles?

The Court: I notice another, James Ming Produce Company.

The Witness: The man got produce. He bring his merchandise from the farmer and his boxes not in good condition and he take mine and put the merchandise in my boxes.

The Court: I notice another account, California Crate Company.

(Testimony of Harry Simonian.)

The Witness: Well, he is a company, too, like me. He buys them from us. [54]

The Court: He is another wholesaler?

The Witness: Yes. He sell them to somebody else.

The Court: Then you don't sell exclusively to farmers?

The Witness: I sell farmers, too.

The Court: Farmers, wholesale companies, produce companies?

The Witness: Yes.

The Court: All right.

Mr. Dooley: One question, if I may.

The Court: Yes.

Q. (By Mr. Dooley): Then all the persons that you sell to are in business, are they not?

A. Well, some. Mostly go to farmer.

Q. In business or farmers?

A. Some produce, you know, sometimes he comes over there and his boxes broke and he picks up two or three boxes, 10 boxes, and take them over there and put his merchandise in them, in the good boxes.

Mr. Dooley: I did not catch the answer to the last question. Will you please read the answer?

(Answer read.)

Q. (By Mr. Dooley): All the persons to whom you sell in business are in farming?

A. Yes.

Mr. Dooley: That's all. [55]

Mr. Campbell: Just a question.

(Testimony of Harry Simonian.)

The Court: All right.

Recross Examination

Q. (By Mr. Campbell): Mr. Simonian, this Market Town you refer to, that is a retail market, isn't it? A. Yes.

Q. Where they sell groceries and produce and other things? A. Yes.

Q. Isn't it a fact that you both buy used boxes from and sell reconditioned boxes to them?

A. Yes. I buy empty boxes, yes.

Q. You both buy from them—— A. Yes.

Q. ——and you also sell reconditioned boxes back to them, isn't that right? A. Yes.

Q. Isn't it a fact, to your knowledge, Mr. Simonian, that the Market Town gives some of these boxes away to their customers to take their groceries away? When you go in and buy a large lot of groceries, they use some of these boxes so you can carry your groceries home?

A. I buy Market Town merchandise, empty boxes. I bring [56] them to my yard for repairing and sell to farmers.

Q. Did you know that the Market Town gives their customers wooden boxes? A. Yes.

Q. And some of those are the boxes you sold them? A. Right.

Mr. Campbell: That is what I understood. That's all.

Mr. Dooley: No further questions.

(Testimony of Harry Simonian.)

Mr. Campbell: You can step down.

(Witness excused.)

Mr. Dooley: The plaintiff is willing to stipulate all the defendants would testify substantially as the first three witnesses who testified.

Mr. Campbell: We keep broadening this out. I wasn't able to understand all the testimony, unfortunately, that this witness gave. I renew my stipulation.

The Court: Well, this witness testified he is in the business and he sold, he said he sold exclusively to farmers, but the fact of the matter is he sells not only to farmers, but to other people in the same kind of business, and to a crate company here. He sells, like the rest of these people do, to anybody that comes along.

Mr. Campbell: That's right. I will stipulate they sell to anybody that comes along. They are in the business of handling [57] containers which are ordinarily used in agricultural pursuits and the majority of their sales are made to people they believe are engaged in agricultural pursuits.

Mr. Dooley: If we just stipulate they will testify essentially the same as the first three witnesses——

The Court: All right, let it go at that. If you want to bring in any others to testify contrary, you can.

Mr. Campbell: All right. I will so stipulate.

The Court: All right.

Mr. Dooley: Your Honor, I believe CPR 142 is

already in evidence. The plaintiff asks the court to take judicial notice of the provisions of CPR 142. As the court knows, judicial notice will be taken of price regulations and their contents.

The Court: We have a stipulation that the defendants sold second-hand containers as set forth in the plaintiff's complaint.

Mr. Campbell: Sold the quantities and at the price.

The Court: Yes. We also have a stipulation, do we not, that the price charged is in excess of the price set forth in regulation 142?

Mr. Campbell: No, your Honor. The stipulation as I intend it did not go that far because I have always held 142 is invalid and does not establish prices, and they are repugnant one to the other. The prices set forth in the column on [58] Exhibit A to the complaint are, I believe, and I will stipulate, subject to any change which might occur, I mean any clerical error there might be, that the prices as set forth in Exhibit A are those set forth in the tabulated section part of 142.

The Court: All right. That's fair enough. I just want to be sure that the plaintiff is making a *prima facie* case.

Mr. Campbell: I don't want to get myself into stipulating 142 is valid.

The Court: No. I understand your contention relative to 142.

Mr. Campbell: Yes, sir.

The Court: But I want to be sure that the plaintiff is making a *prima facie* case, that's all.

Mr. Dooley: That stipulation is accepted and the plaintiff rests.

Mr. Campbell: May all motions be deferred to the end of all the evidence?

The Court: Yes, and then we know what we are talking about.

Mr. Campbell: Then we will proceed to take the evidence now, your Honor?

The Court: All right.

Mr. Campbell: Mr. Dix, will you take the stand?

BENJAMIN DIX

called as a witness herein by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Campbell): Just keep your voice up so that everybody can hear you. Will you state again how long you have been engaged in the business of handling used boxes?

A. Since 1947.

Q. Your concern, the Dix Box Company, is a partnership? A. Yes.

Q. What is your exact position there? Are you the manager?

A. You might say that, yes.

Q. Do you handle both the purchase of the boxes which are the subject of your business and their sale?

A. I have access to the purchasing. My brother actually does most of the purchasing.

(Testimony of Benjamin Dix.)

Q. Do you handle the selling?

A. I handle the selling.

Q. Do you supervise the keeping of the records and the other office procedures down there?

A. That's right.

Q. Let me ask you this. Generally speaking, where do you [60] acquire the boxes which are presently sold in your business?

A. We have chain stores that we—grocery stores that we buy from, and we have people that buy boxes and bring them into our yard and resell them to us. Where they get them, I don't know.

Q. You have two types, I take it, of places where you buy, either from people bringing them into your yard to sell them to you in quantity lots, or where you go out and buy them, or they are brought in to you by retail establishments with whom you have some previous contacts, is that correct?

A. Yes, and from other dealers.

Q. And from other dealers? A. Yes.

Q. As necessary, or I presume where a dealer is overstocked with a certain type——

Mr. Dooley: I object. This is rather leading, your Honor.

Mr. Campbell: I was trying to save time.

The Court: It is leading, but we are interested in the facts here and it is preliminary. I will overrule the objection.

Mr. Campbell: Will you read where I was?

(Record read.)

Q. (By Mr. Campbell): ——with a certain type

(Testimony of Benjamin Dix.)

of container, they often sell as between themselves, is that correct? [61] A. Yes.

Q. Let me ask you this, Mr. Dix. Approximately how many are there in Southern California engaged in this particular type of business?

A. About 20 to 25.

Q. Based on your experience, as a matter of fact, the Dix Box Company is one of the larger concerns in that business, is it not?

A. I think so.

Q. Approximately what percentage of the used box industry would you say is represented by the 14 defendants who are here in these cases?

A. The majority.

Mr. Dooley: I object, irrelevant, your Honor. I don't see the relevance.

The Court: Overruled.

Q. (By Mr. Campbell): Could you put it in segments of percentages?

A. I would say about 95 per cent.

Q. 95 per cent of the industry? A. Yes.

Q. You are acquainted, are you not, with Mr. Alvarado, who appeared on the stand?

A. Yes.

Q. He testified, I believe, he operated the Alvarado [62] Box Company. Do you know of your own knowledge whether he operates in the purchase or acquisition of boxes, a company similar to those that the rest of you operate?

A. I would say he is one that operates different than most everybody else.

(Testimony of Benjamin Dix.)

Q. In what respect?

A. Well, I don't know whether he buys or gets his boxes on consignment from the Safeway Stores. His function is primarily to recondition and return the containers to Safeway or to people that Safeway buy their produce from. The majority of his boxes is supposed to go back to Safeway customers.

Q. In other words, based on your observation, his business is primarily with or on behalf of one customer, is that correct? A. Yes.

Q. I take it that the rest of you are dealing generally with—let me be more specific. In your own case, approximately how many sources of boxes that you are buying do you deal with?

A. How many sources?

Q. Yes.

A. How many different accounts?

Q. That you are buying from.

A. Probably 15 or 20.

Q. Roughly, how many accounts do you have that you are [63] selling to?

A. Maybe 300.

Q. When you receive the boxes from the markets or establishments from which you obtain them, they are in varying degrees of condition, are they not? A. That is true.

Q. What do you do with those boxes, speaking generally now, to prepare them for resale?

A. We recondition them so that they will be a sound container.

(Testimony of Benjamin Dix.)

Q. What is embraced in the word "recondition"?

A. Well, where broken, we will replace the boards; where the nails are loose, we will replace the nails; where a mark is on there and we have a specific order from somebody to remove that mark, we will remove the mark.

Q. Are you referring to brand marks that are on the boxes? A. Yes, and labels.

Q. That is, either by a label or sometimes by being stamped or burned into the box, is that true?

A. Yes.

Mr. Dooley: I object as putting words in the witness' mouth, your Honor.

The Court: Overruled.

Q. (By Mr. Campbell): Is that correct? [64]

A. Yes, that is true.

Q. What process do you use to remove the marks which are permanently affixed to the wood?

A. We have a sanding machine and by rubbing the boxes against the revolving disk on the sanding machine, the mark comes off.

Q. In addition to the reconditioning which you have described by way of replacing broken parts of the boxes and your sanding, do you also do cleaning?

A. Cleaning?

Q. Yes, by water or other liquids.

A. No.

Q. They are either sanded or left as is so far as cleaning is concerned?

A. Yes, unless there is refuse, old merchandise,

(Testimony of Benjamin Dix.)

maybe some dust or some debris inside the boxes, and we will remove it by hand.

Q. In preparing those boxes for resale, in addition to any reconditioning which is required, and sanding which may be required, will you state whether or not on occasion it is necessary to do special work with relation to particular uses to which that box may be put?

A. Yes. I mean a lug box probably has 100 different uses and 100 different types of customers, so we will upon request of the customer furnish him a container that is especially [65] adapted for his use.

Q. What does that require, for example?

A. Well, extra labor and extra material.

Q. Would it in some instances require special cleats?

A. Special cleats, narrow cleats, wide cleats.

Q. Special partitions within the boxes?

A. Sometimes they have special slats on the outside, but I don't think inside.

Q. Now, generally speaking, before the Defense Production Act of 1950, that is the Office of Price Stabilization, came into existence, was it your experience in the industry that with respect to any given type of container there existed what might be called a historical difference between the price at which you purchased these boxes before reconditioning and the price which you received on selling?

(Testimony of Benjamin Dix.)

Mr. Dooley: I object, your Honor. I can see no relation to the issue.

The Court: How is this material? What are you trying to establish? I will take judicial knowledge that a fellow who is dealing in merchandise is supposed to sell for more than he pays for it.

Mr. Campbell: Yes, your Honor, and it is deeper than that. I am leading up to the meetings which have previously been referred to with the OPS.

The Court: You are leading up to the meetings? [66]

Mr. Campbell: Yes.

Mr. Dooley: I don't see any relevancy.

The Court: Objection overruled. It may be relevant. I don't know. You may make a motion to strike if it is not connected up.

Q. (By Mr. Campbell): Will you answer?

A. There has always been a definite difference.

Q. Was that a difference in cents per container?

A. Well, it would be cents and it would be percentage-wise, also. Not definitely percentage-wise, but in relation of one figure to the other.

Q. That would depend not only on the type of container, but the type service that was done, would it? A. Yes.

Q. In addition to the services which you have previously described which are done in your industry with respect to these containers, that is to say the repairing and sanding and cleaning where necessary by hand and the placing of special cleats or other matters in connection with those boxes, do

(Testimony of Benjamin Dix.)

you also at a customer's request place new labels on boxes? A. Definitely.

Q. Was a price per container charged for that service? A. Definitely.

Q. Did you also, in connection with the services which you rendered, deliver boxes to the purchaser?

A. On occasion, yes.

Q. When required by the purchaser?

A. Would you repeat the question?

Q. Did you deliver boxes to the customer?

A. For the same prices?

Q. No. Did you make delivery yourself, or was it always a case of a customer coming to your yard and taking delivery? A. We do both ways.

Q. You do it both ways?

A. Whichever way the customer wants.

Q. When delivery was made, was an additional charge made for that delivery? A. Always.

Q. That has always been the practice in the industry? A. Always.

Q. At the time the OPS came into effect, Mr. Dix, it is a fact, is it not, that the period applied for your ceiling prices, was that a period of December 20, 1950, to January 19, 1951?

A. Yes.

Mr. Dooley: I will object again. I don't see the relevancy.

Mr. Campbell: It is a matter of law and it is preliminary.

The Court: Overruled. It is preliminary. He is trying [68] to lead up to something.

(Testimony of Benjamin Dix.)

Q. (By Mr. Campbell): Will you describe, Mr. Dix, the conditions as they prevailed specifically in December, between December 20, 1950, and January 1951, compared to the rest of an average year, that is to say, is that a period of activity in the box business or comparative inactivity?

A. It is a definite period of inactivity.

Q. What is the packing period in the box business when you are handling and selling a large number of boxes?

A. I would say from June to October.

Q. That is true, is it not, because dealing in agricultural containers primarily your season of activity is when the crop is being harvested and packed and sent to market, isn't that correct?

A. Correct.

Q. Could you state in terms percentagewise the activity of your business in the period December 20 to January 19 as compared to your annual business?

A. Do you mean how much business would we do in the months, December 20 to January 20, compared to the month of September or October?

Q. As compared to your peak months.

A. I would say in that month we would probably do about 20-25 per cent or about 75 per cent less business.

The Court: Let me ask you a question. Before the OPS [69] came into existence, did the price of second-hand boxes fluctuate with the season?

The Witness: Yes, definitely.

The Court: In other words, the price of boxes

(Testimony of Benjamin Dix.)

during the harvest was higher than when there was no harvest?

The Witness: Yes, your Honor.

The Court: And will you say that the price was cheaper in December and January than it would be in August and September?

The Witness: Yes, your Honor.

The Court: That was before OPS came into existence?

The Witness: Before OPS came into existence.

Mr. Dooley: Your Honor, I request defendants state what element of the case he is seeking to refute so that the court can know just how to fit this evidence in with the issue in the case.

The Court: I am assuming this fluctuation is related to the whole question of supply and demand. With a big supply and no demand, prices ought to go down.

Mr. Dooley: What issue does that fit in the case?

The Court: This is preliminary. I think I know what the defendant is trying to do.

Mr. Dooley: I will ask the defendant to state what he is trying to get at.

The Court: You let the defendant produce the evidence as [70] he sees fit.

Q. (By Mr. Campbell): During that period before OPS came in and specifically between December 20, 1950, and January 19, 1951, you stated sales were much smaller, is that correct?

A. Correct.

Q. Isn't it a fact that during such a period of

(Testimony of Benjamin Dix.)

inactivity, it has been your experience that the selling price will vary from company to company?

A. Definitely.

Q. If you had a customer, you would sell to him at what price you could get, is that right?

A. That's right.

Q. As a result of that, it is a fact, is it not, Mr. Dix, that you found yourself in the industry using a ceiling price, when it first came in for that period, based on that period where the ceiling prices were different for practically every dealer in town?

A. That is true.

Q. As a result of that, Mr. Dix, I will ask you if you and the other box companies, and specifically those who are represented here, undertook to obtain some relief from Washington, and the establishment of uniform ceiling prices?

A. As soon as our customers told me there was a regulation, we tried that, yes.

Q. As soon as you learned your ceiling price was December [71] to January, is that correct?

A. Yes.

Q. Let me ask you this. Had there been some formal or informal association of box dealers prior to that time?

A. Yes.

Q. Did you in these various efforts to obtain whatever relief you did afterwards obtain for the industry, deal together as a group?

A. Yes.

Q. Having found, as you have related, that there were different ceiling prices as to each of the deal-

(Testimony of Benjamin Dix.)

ers in Los Angeles, I believe you stated you did at that time attempt to obtain assistance from Washington, is that right? A. Yes.

The Court: What do you mean by "that time"? Let's specify the dates, approximately. Was that 1950 or 1951?

Q. (By Mr. Campbell): That was in 1951, Mr. Dix?

A. Yes, when the OPS regulation came out, yes.

Q. In that connection did you and the other box dealers engage in the services of a firm of attorneys here in Los Angeles for the purpose of taking up various matters with Washington?

A. I don't quite understand you.

Q. Did the box association hire some attorneys to represent them in Washington in that connection? [72] A. Prior to OPS or after OPS?

Q. After OPS came in.

A. After OPS came in, we didn't hire—well, wait a minute. After the freeze, we hired the attorney.

Q. That is what I am referring to. After the prices were frozen as of your December to January date, you hired some attorneys, did you not?

A. Yes.

Q. Who were they? A. Snyder & Snyder.

Q. A Los Angeles firm? A. Yes.

Q. As a result of their efforts, did you subsequently receive, under date of June 28, 1951, what was known as Order L-117? A. Yes, we did.

Mr. Campbell: I will offer that in evidence.

(Testimony of Benjamin Dix.)

The Court: Has the District Attorney seen that?

Mr. Campbell: Yes. This was submitted at the pre-trial hearing.

Mr. Dooley: I object to that on the ground it is irrelevant.

The Court: Overruled. It may be received and marked Defendants' Exhibit A. [73]

(The document referred to was received in evidence and marked as Defendants' Exhibit A.)

DEFENDANTS' EXHIBIT "A"

Copy

June 28, 1951

Docket No. GCPR, Sec. 7-31-4

In reply refer to: 2431:1:sl

A.B.C. Crate Company

Los Angeles, California— et al *(See Appendix)

GCPR, Section 7, Order No. L-117

Gentlemen:

Reference is made to your application, filed through Snyder and Snyder, Attorneys at Law, of Beverly Hills, California, dated June 7, 1951, in which you request that the director of Price Stabilization establish ceiling prices for your fruit and vegetable containers under the provisions of Section 7 of the General Ceiling Price Regulation. This regulation authorizes the Director of Price Stabilization to set ceiling prices for a commodity or service when such price cannot be determined under any other section.

Defendants' Exhibit "A"—(Continued)

On the basis of statements made in your application, it appears that you are unable to determine your ceiling prices under any other provision of the regulation. It further appears that your proposed ceiling prices are in line with the level of ceiling prices otherwise established by this regulation. It further appears that delay in establishing ceiling prices for this commodity may cause a delay in supplying growers, packers, shippers and produce commission merchants and thus preventing their shipment of fruits and vegetables to the detriment of the health and welfare of the country.

After due consideration of the foregoing, and pursuant to Section 7 of the General Ceiling Price Regulation,

It is ordered:

(a) That the ceiling price for the sale of fruit and vegetable containers by the A.B.C. Crate Company, Los Angeles, California, et al.* shall be:

- (1) Lugs—12c.
- (2) Three-quarter lugs (Flat)—12c.
- (3) Wirebound Crates—19c.
- (4) Vegetable Crates—25c.
- (5) An additional charge for sanding lug boxes when required—5c per lug.
- (6) Customary place of delivery and customary price differentials to apply.

(b) All provisions of the General Ceiling Price Regulation, except as changed by the pricing provisions of this order, shall remain in full force and effect as far as you are concerned.

Defendants' Exhibit "A"—(Continued)

(c) This order may be amended, modified, or revoked by the Director of Price Stabilization at any time.

A copy of this order has been filed with the Recording Secretary of the Office of Price Stabilization at Washington 25, D. C., where it may be examined by the public.

This order shall be effective immediately.

Very truly yours,

Michael V. DiSalle, Director

/s/ By W. J. Damtoft, Acting Director,
Forest Products Division

* Appendix:

The provisions of this letter order shall also be applicable to the following named applicants who have also supplied the information required by General Ceiling Price Regulation, Section 7:

Acme Crate Company, Dix Box Company, Produce Box & Crate Company, Ace Box & Crate Company, C & S Box Company, Mandell's Crate & Box Company, Simonian Crate Company, Oranessian Crate Company, Ajax Crate Company, Carbal Crate & Box Company, L. A. Box & Crate Company, Pete's Crate & Box Service, United Crate Company, S. E. Bevis, Louie's Crate & Box Company, Star Box & Crate Company, Alvarado Crate Company, Growers Box & Crate Company, Standard Crate Company, Three Brothers Crate Company, Atlas Crate and Box Company, Christie Crate Com-

Defendants' Exhibit "A"—(Continued)

pany, H. M. Hernandex & Sons, Martello Box & Crate Company, Triangle Crate Company, Valley Crate & Box Company.

The Court: When you say you received it, you mean you personally received this?

The Witness: Each company received it.

Q. (By Mr. Campbell): I will show you this Exhibit A. This is addressed to the A. B. C. Crate Company of Los Angeles, California. I will ask you if you received a copy of that communication from the OPS. A. I did.

Q. Mr. Dix, I call your attention to the fact that that order purports to set forth certain ceiling prices expressed in cents for various types of fruit and vegetable containers, and provides further that an additional charge may be made of 5 cents per lug for sanding, and provides further that customary place of delivery and customary price differentials are to apply in the sale of fruit and vegetable containers. Do you recall that? A. Yes, I do.

Q. After you and the other members of the association received this order L-117, did you attempt to the best of your ability to comply with the terms of this order? A. We did.

Q. I believe you previously stated you and the other 13 firms that are represented here represented 90 to 95 per cent [74] of the industry, is that right?

A. That is true.

The Court: May I interrupt a minute? I want to

(Testimony of Benjamin Dix.)

straighten something out, if I can. What is the date of Exhibit 1? That is April 29, 1952. This Exhibit A is dated June 28, 1951.

Mr. Campbell: Yes, your Honor.

The Court: This letter was received prior to Exhibit 1?

Mr. Campbell: 142, yes. 142 purported to replace this order.

The Court: Is the government contending in any way that this is not a valid order, Exhibit A?

Mr. Dooley: The government does not contend that is not a valid order. The government contends that was not in force and effect at the time of the violations complained of.

The Court: That's all right. It is signed by Michael V. DiSalle, Director, and it is sent to each one of the box companies, and you are not contending when that order was signed and sent to these box companies, it didn't become a valid order?

Mr. Dooley: It was valid at the time.

The Court: You are contending this was superseded by another order?

Mr. Dooley: It was superseded by CPR 22.

The Court: It's 12:00 o'clock now. We will now recess until 2:00 o'clock this afternoon. [75]

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m., of the same date.) [76]

The Court: Proceed.

BENJAMIN DIX

the witness on the stand at the time of the recess, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Campbell): Mr. Dix, just before the noon recess, you testified, I believe, after letter order L-117, which has been admitted as Exhibit A, came into being, that you used your best efforts to comply with the prices as set forth in that order, is that right? A. That is true.

Q. Mr. Dix, based on your personal experience in this business here in the Los Angeles area, what are the types of fruit and vegetable containers that are principally sold by those engaged in that business in this area?

A. Well, I would say it would be lugs, apple boxes, and lettuce crates.

Q. Approximately what percentage of your business consists of those items? [77]

A. Lugs would be the majority. It is awfully hard to say what percentage. I never did figure it out percentagewise. But take away the lugs, apple boxes and lettuce crates and we might as well quit.

Q. That is the backbone of your business, is that correct? A. Yes.

Q. I notice in Order No. 142, which is Plaintiff's Exhibit 1 in this case, there are a number of items

(Testimony of Benjamin Dix.)

referred to as peach flats, avocado flats, strawberry and tomato flats. Do those items constitute any bulk of your business?

A. We don't differentiate between them in that manner. We call a lug a lug and a flat a flat. That is the only two types we would have. Avocado would be a different container altogether.

Q. In your business they are not known as avocado flats?

A. Yes, but we don't have anything called a peach flat.

Mr. Dooley: When the witness says "we," who is he referring to?

Q. (By Mr. Campbell): By "we," are you referring to yourself principally?

A. For myself for sure, and I believe the other fellows.

Q. In the trade generally?

A. I know of nobody that has a peach flat.

Q. Now, I have asked you, Mr. Dix, if you would examine [78] your records as to the ceiling prices of the various commodities which you were handling as established for the period in which prices were frozen originally under the OPS act, that is December 20, 1950, to January 19, 1951. Have you done so?

A. Yes, I have.

Q. And have you listed those on a memorandum?

A. Yes, I have.

Q. Were these taken directly from your books and records?

A. Directly from invoices.

Q. And those invoices are also present in the

(Testimony of Benjamin Dix.)

courtroom in the event counsel desires to examine them, is that correct? A. Yes.

Q. Have you also, in connection with those various commodities and at my request prepared a memorandum from your invoices as to the buying prices of those principal commodities during that same period? A. Yes, I have.

Q. And is this the memorandum which I show you? A. That is the memorandum.

Q. That was also taken from your books and records? A. Right.

Mr. Dooley: Are you offering these?

Mr. Campbell: Yes. [79]

Mr. Dooley: I object, irrelevant, immaterial. It refers to a period that antecedes the period with which we are concerned before this court. I see no relevancy whatsoever.

The Court: Overruled. Defendants' Exhibit B.

Mr. Campbell: May the two documents be admitted as one?

The Court: Yes.

The Clerk: Defendants' Exhibit B.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit B.)

The Court: May I ask this witness a question? What is a wire-bound crate?

The Witness: A wire-bound crate is a container made of wood slats that is bound together and held together by wire.

The Court: Would that include an orange crate?

The Witness: No. An orange box would be held

(Testimony of Benjamin Dix.)

together by nails. One piece would be nailed to the other.

The Court: What kind of crate would be held together by wire?

The Witness: A series of slats that would be bound together as on hinges, only they would use wire instead of nails.

Q. (By Mr. Campbell): And what is the commodity?

A. Principally beans, peas, grapefruit—no, not grapefruit, but peas and beans.

The Court: Did you make any distinction at all as to [80] vegetable crates?

The Witness: And differential?

The Court: Yes.

The Witness: I don't understand the question, your Honor.

The Court: What vegetables do you use in crates, let's put it that way.

The Witness: A vegetable crate is commonly termed as a lettuce crate.

The Court: Would you have any other crate other than lettuce crates?

The Witness: Yes. We would have the lettuce crate, the orange crate.

The Court: Would an orange box be called a crate?

The Witness: I believe so.

The Court: What kind of a container do carrots have?

The Witness: Carrots would come in a lettuce

(Testimony of Benjamin Dix.)

crate, same type container, and also when they cellophane-pack them, they would be in a wire-bound container.

The Court: What kind of container was used for celery?

The Witness: Sometimes a nailed crate, a sturdy crate, or a wire-bound crate.

The Court: Then you really had under this No. L-117, you really had just two kinds of crates, wire-bound crates and vegetable crate?

The Witness: I believe so. [81]

The Court: What did you do about orange boxes?

The Witness: Orange boxes—do you mean by that what did we do about prices?

The Court: No, how would you catalog an orange crate?

The Witness: Your Honor, our business is not that technical where we would care whether it was called a box or a crate. The initial name of lettuce or orange would be sufficient.

The Court: Would you consider an orange box or orange crate in the same category as a lettuce crate?

The Witness: No, sir.

The Court: Would you have any difference in price?

The Witness: Yes. An orange crate would be a definite style and a lettuce crate would be a definite different style.

The Court: You have here wire-bound crates

(Testimony of Benjamin Dix.)

19 cents, and you have vegetable crates 25 cents. How would you classify an orange box?

The Witness: They don't classify orange boxes at all in that respect in that one.

The Court: No, not in L-117.

The Witness: Orange boxes are a minor item, and at the time 117 came out, it was not an important enough item—in other words, the freeze price was probably satisfactory to all concerned at the time and so we didn't look for relief from the freeze price. [82]

The Court: L-117 said vegetable crates 25 cents. Did that include all vegetable crates, regardless of size?

The Witness: Your Honor, for all intents and purposes, a vegetable crate is known in the box industry as a lettuce crate, a crate $24\frac{3}{4}$ inches long——

The Court: I know what a lettuce crate is. But is there any other crate besides a lettuce crate?

The Witness: A lettuce crate would be used for lettuce and cabbage and carrots and green beans, small bunch goods, but an orange crate could not be used where a lettuce crate would be used.

The Court: What kind of crate would you use for celery?

The Witness: It would be a different crate, sturdy crate or a wire-bound crate.

The Court: What was the difference in price under L-117 between a lettuce crate and a crate that you used for celery?

(Testimony of Benjamin Dix.)

The Witness: There was a big difference in price. The lettuce crate makes up a big part of our volume. The celery crate is a very small part.

The Court: Did you sell them for the same price?

The Witness: No, sir.

The Court: What was the difference?

The Witness: Why would there be a difference?

The Court: No. How much was the difference?

The Witness: Oh, from 5 to 7 cents. [83]

The Court: Did you have any melon crates?

The Witness: Yes, sir, we had melon crates.

The Court: What kind of crate was used for melons?

The Witness: Melon crates.

The Court: How does it differ from a lettuce crate?

The Witness: Again in its size and nature of its use, but a melon crate is highly seasonable and at one time of the year it could be worth 25 cents, and 60 cents later. It would be worth numerous prices.

The Court: Would you call a melon crate a vegetable crate?

The Witness: No, sir.

The Court: L-117 had no classification for a melon crate?

The Witness: Because of its nature. A melon crate, regardless of any ceiling, isn't an important enough item where we are concerned about it. It is not essential to our well-being, so it isn't important whether we handle melon crates or not because it

(Testimony of Benjamin Dix.)

is very seasonable. It sells for a couple of months out of the year, and we break them up the rest of the time. We were concerned with L-117 when it came out for release in our essential items.

The Court: And that is what?

The Witness: Lugs, apple boxes and lettuce crates.

The Court: What is an apple box? Is that the box that [84] they send to stores in which the apples are shipped?

The Witness: Yes, your Honor.

The Court: And a lug is something you use out in the field to lug the vegetables in from the field, isn't it?

The Witness: No, sir. A lug is a smaller container used for a smaller type of mostly deciduous fruits, and is used to bring the merchandise into the market. A lug is not used for lugging, but actually used to market produce. I think there is a standard government measure for that.

The Court: Then your business to a great extent was based on lugs, apple boxes and lettuce crates.

The Witness: Yes, your Honor.

The Court: The rest was incidental.

The Witness: Incidental. What we might call necessary evils.

The Court: All right.

Q. (By Mr. Campbell): Mr. Dix, referring to the three periods which are set forth in Order No. 142, did you also examine your records and make

(Testimony of Benjamin Dix.)

a memorandum therefrom as to the price obtained by you for the various types of containers which you sold in such period for the period May 24, 1950, to June 24, 1950; January 25, 1950, to February 24, 1951, and March 29, 1952, to April 29, 1952?

A. I did.

Q. Is that the memorandum which I have in my hand? [85]

A. Yes.

Q. And that was prepared by you from your books and records, is that right?

A. That's right.

Mr. Dooley: The plaintiff objects to this.

The Court: It hasn't been offered as yet.

Mr. Campbell: I offer them now together.

Mr. Dooley: The plaintiff objects on the ground that the period shown is from May 24, 1950, to June 24, 1950, and that is not before the court, and on the further ground that the evidence the defendant seeks to offer could only have any relevancy to the validity of the regulation 142, and this court has no jurisdiction to determine the validity. It would seem that this would be irrelevant and immaterial before this court.

The Court: Objection overruled. It may be received as Defendants' Exhibit C.

The Clerk: Defendants' Exhibit C, so marked.

(The document referred to was received in evidence and marked Defendants' Exhibit C.)

Q. (By Mr. Campbell): Mr. Dix, do you recall when purported order CPR 142 was published and circulated to the members of the box industry?

(Testimony of Benjamin Dix.)

A. Yes, I do.

Q. Do you remember that event?

A. Yes. [86]

Q. A copy of which has been introduced here as Government's Exhibit 1. At that time and immediately after receipt—strike that.

First, did you have any information or had you received any information from any of the officers of OPS that such an order would be issued?

A. No, we had not.

Q. I take it, then, your first knowledge of the 142 was when you received a copy of it, is that correct? A. Yes.

Q. The order itself, which is Exhibit 1 here, is dated April 29, 1952. With that date in mind, do you recall approximately when you first saw this order?

A. I believe it was about two weeks afterwards.

Q. By whom, if anyone, was it called to your attention?

A. We went down to the OPS to find out about it. We had heard such an order was in existence.

Q. But you had not seen it up to that time?

A. No, sir, we had not.

Q. Do you recall whether there was some official of the OPS or someone in the industry that had called your attention to it?

A. One of my customers called me up and told me I was in violation.

Q. Of the then existing order, is that correct?

A. That's right.

(Testimony of Benjamin Dix.)

Q. On that occasion, did you then and other members of the box industry go to the office of the OPS? A. Immediately.

Q. Do you recall more precisely the date of that meeting, the first meeting?

A. I don't recall the date. I know it was after the order had come out, and it was about a week after the order came out. Then I went down and we saw Mr. Hameetman.

Q. Is that Jacob Hameetman?

A. I don't know his first name.

Q. Do you recall his position?

The Court: How do you spell that name?

Mr. Campbell: H-a-m-e-e-t-m-a-n.

The Witness: I am not sure of his exact position.

Q. (By Mr. Campbell): What office was he connected with? A. The OPS office.

Q. Had you met him prior to that time?

A. About a year before.

The Court: May I interrupt just a minute? Where was the OPS office at this time?

The Witness: In downtown Los Angeles. I am sorry, I don't know the exact address.

Q. (By Mr. Campbell): Does this refresh your recollection? Was it at 108 West Sixth Street in the City of Los [88] Angeles?

A. It seems to me that would be it.

Q. On that occasion, who was with you when you went down there after 142 was called to your attention?

(Testimony of Benjamin Dix.)

A. The first occasion I went down by myself. I went down immediately after my customer told me I was in violation to find out what it was all about.

Q. That is the first knowledge you had of any order, is that correct? A. That's right.

Q. Whom did you see on that occasion?

A. Mr. Hameetman.

Q. Was he the only person that you saw?

A. On that occasion, yes.

Q. Did you inquire for Mr. Hameetman when you went to that office? What was the occasion of your meeting him down there?

A. I asked to talk to somebody that had something to do with the wooden box regulation.

The Court: You went into the office and you asked somebody. Whom did you ask?

The Witness: A girl at the desk.

The Court: Information girl?

The Witness: I think so.

The Court: All right. You say you asked for somebody. [89] Did she tell you to see Mr. Hameetman?

Q. (By Mr. Campbell): On that occasion did you have a conversation with Mr. Hameetman?

A. Yes, I did.

Q. Will you relate that conversation?

A. Well, it was a very brief one. He told us that the order had come out.

Q. You say "us." Was there someone with you?

A. I am sorry. He told me that the order had

(Testimony of Benjamin Dix.)

just come out and it was going to be a big help for us because they had given us an 18 per cent increase and he thought I and the rest of the box industry should be very happy about it.

Mr. Dooley: I object to a portion of that as being hearsay.

The Court: If that is what he said, it isn't hearsay. He is testifying to what Mr. Hameetman said.

Mr. Dooley: It is not being introduced for the truth or veracity of the statement.

The Court: That doesn't make any difference. This is the testimony of what was said by Mr. Hameetman. The objection is overruled.

The Witness: At that time he told me that it was impossible——

The Court: Just a minute. Did he give you a copy of the regulation then? [90]

The Witness: No, your Honor, he did not.

The Court: Did he show you a copy?

The Witness: He showed me a copy.

The Court: All right.

Q. (By Mr. Campbell): Did you read the regulation on that occasion?

A. I read the regulation then, yes.

Q. Relate the further conversation you had with Mr. Hameetman.

A. I looked at the prices and I told him it was impossible to go along with such a thing. I said, "We are better off to close up because it is impossible to operate."

(Testimony of Benjamin Dix.)

Q. Did you tell him why?

A. He asked me, "How do you know it is impossible? You haven't tried it."

I said, "It isn't necessary to try it. I know what my costs of operating are. I know I can't operate at an increased buying price and a lower selling price and still pay my bills."

Q. Were the prices on 142 less than the prices which you were selling at under 117 as to the larger items?

A. The selling prices were higher and the buying prices were higher.

Q. By buying prices, are you referring to the prices set for the retailers? [91]

A. That's right.

Mr. Dooley: I object. The regulations speak for themselves.

The Court: Your objection is good. In 142, where is the buying price?

Mr. Campbell: In this table, your Honor, the price listed as retailer is the ceiling price set at which the dealers buy from the retailers who are defined as the markets and others from whom they secure the boxes.

The Court: In other words, this regulation not only attempted to set the price the dealer could sell for, but also the price he could buy for?

Mr. Campbell: Correct, your Honor. That is the very point the witness was making to Mr. Hameetman at that time, apparently.

The Court: I am just wondering. I guess it has

(Testimony of Benjamin Dix.)

been established that the government had a right to set a ceiling price on commodities. They could say to a person, "You cannot sell over a certain price," and I suppose, also, the government had a right to tell a buyer, "You cannot buy over a certain price."

Mr. Dooley: May I say something in that connection? This evidence is being introduced and we haven't discussed or argued the question that was placed in my memorandum, and it was also raised in the defendants' memorandum, as to whether this [92] court has jurisdiction to determine the validity.

The Court: I understand that. Let's get the facts and then we can argue the legal points.

Mr. Campbell: That is what I had in mind, your Honor.

The Court: I remember a case I tried some time ago relative to the ceiling price of a machine tool, and it seems to me the regulation in that case set forth that the buyer was just as much at fault as the seller, and the buyer was responsible if he violated the law just as much as the seller. This regulation attempts to establish the price that the retailer, the individual, could sell to the wholesaler.

All right, you can proceed. I just wanted to be sure I understood.

Q. (By Mr. Campbell): Will you proceed with your conversation with Mr. Hameetman? You had gotten to the point where he had shown you for the first time this regulation 142 and you had stated,

(Testimony of Benjamin Dix.)

I believe, it was impossible for you to operate under these prices because the price at which you could sell was lower than the price at which you could buy, is that correct?

A. That is correct.

Q. Proceed with what was said on that occasion.

A. The first occasion, there wasn't very much.

Q. All I want at this time is the first time you were there with Mr. Hameetman. [93]

A. I asked him if I could have an order and he said they were in the process of mailing the orders and they had them all laid out on the desk.

Q. 142, this order which is here as Government's Exhibit 1?

A. That's right. He said they were in the process of mailing them and we would get them in the normal course of mailing, and the government wasn't to go ahead until we had gotten the order and had a chance to look at it.

Q. That was the substance of the conversation?

A. That was the substance of the conversation.

Q. Did you subsequently return to the office of the OPS after you and, I presume, the other box dealers, had received copies of 142?

A. On several occasions.

Q. When was the next occasion? Was there an occasion upon which you and a committee from the box dealers went to the office?

A. Yes. I wouldn't be able to say the amount of days. It wasn't long after that, just several days or a few days at most.

(Testimony of Benjamin Dix.)

Q. Would you say it was by the middle of May?

A. By that time.

Q. By that time? A. Yes. [94]

Q. Were there any delays at all after you received this order and—from the time you were first aware of this order, were there any delays in meeting with OPS officials?

A. No. We did it as soon as an appointment could be arranged.

Q. When you say “we,” you are referring to the other box dealers?

A. A committee from the association.

Q. The association appointed a committee?

A. That’s right.

Q. Who was on that committee?

A. If I remember correctly, there was myself, Mr. Ginsberg—

Q. The gentleman here at the counsel table with me?

A. Yes, of the Star Box, Standard Crate, and Acme Crate, if I remember correctly.

The Court: How many all together?

The Witness: I believe five of us.

Q. (By Mr. Campbell): Did you and this committee then after having made some appointment, proceed to the offices of the OPS?

A. Yes, we did.

Q. That was by the middle of May?

A. Yes.

Q. To the best of your recollection? [95]

A. Yes.

(Testimony of Benjamin Dix.)

Q. Did you make any note of the day at that time? A. No.

Q. Who, if anyone, did you meet with there at the OPS office?

A. I think the first meeting was with Mr. Ha-meetman and Mr. Wilson.

Q. Are either of those gentlemen in the court room? A. Mr. Wilson is here.

Mr. Campbell: Will you please stand up?

Q. Is that the gentleman to whom you refer?

A. Yes.

Q. Was anyone else present on that occasion?

A. I don't remember whether Mr. Murray was there on the first or second meeting.

Q. By Mr. Murray, you are referring to an attorney for the OPS who was present here this morning? A. That's right.

Q. You say you don't recall if he was there the first meeting?

A. I don't remember if he was there the first or second.

Q. Do you recall of anyone else being present besides those you have enumerated?

A. There was one other, I am not sure whether she was on the first or second. That was a Miss—I can't think of [96] her name right now.

Q. Do you remember what her capacity was with the OPS? Was she an economist?

A. Yes, an economist.

Q. May I ask if this refreshes your recollection? Was her name Lavine, L-a-v-i-n-e, or Isabel Grant?

(Testimony of Benjamin Dix.)

A. Miss Lavine.

Q. Do you remember an Isabel Grant at any of these conferences? A. Not right now.

Q. Do you recall what Mr. Wilson's capacity was? You have identified Mr. Murray as an attorney.

A. I believe Mr. Wilson was head of the local office.

Q. What part of the office?

A. The local OPS office.

Q. Will you relate what occurred on that occasion?

A. On that occasion, we had opportunity to go through their——

Q. Before you went there?

A. Yes. We had opportunity to go through the regulation and it was impossible to operate any box business under——

Q. We want your conversation. Is that the conversation? Tell us what you told them and what they said.

A. We told them that, and there were several conversations. I can't remember which came in which order, but the [97] gist of the conversation was that the order had originated—no, originally they told us we had recourse to file certain documents, certain graphs, certain charts and different kinds of briefs that none of us in the box business were competent or able to do or understand how to do.

We asked them, seeing as how we were not set

(Testimony of Benjamin Dix.)

up to do any of those things, would they assist us?

They did offer to assist us, and during the course of time, they had their auditors or bookkeepers go through our books and records.

Q. Let me ask you this before we go further. You and the committee had several meetings with these people, did you not?

A. Several meetings.

Q. That was over the course of a few days, or did they extend over some time?

A. They were stretched out as well as could be managed.

Q. And what period would you say?

A. I believe we had meetings with the OPS until the bitter end, until the opposition went out of business.

Q. From then until January 1953, is that correct? A. Yes.

Q. How often would those meetings occur?

A. Well, there would be a meeting after each had been required to do something, and they would be in the process of [98] doing something, so we would meet before they did something and even something was supposed to be done.

Q. Was information asked from you?

A. Information in the way of making records available to their bookkeepers.

Q. Which you had gotten together for them?

A. Yes.

Q. Was the committee from the box companies the same all the time? A. Yes.

(Testimony of Benjamin Dix.)

Q. The same group would meet each time?

A. Yes.

Q. On each of the occasions, would the OPS officials be the same or would they change from time to time?

A. Just about the same.

Q. You were asked to gather together at that time, you say, certain graphs and charts which you stated to them you were unable to do, and they said they would assist you in doing it; that was your testimony?

A. Yes.

Mr. Campbell: I will ask at this time if the United States Attorney will produce, as has heretofore been requested of him, and which I think he has, an economics study, a memorandum made by Mr. Hameetman of the OPS with relation to the pricing of 142, which contains a comparison of the buying and [99] selling prices as they existed under prior regulations, prior to the regulations themselves.

Mr. Dooley: The United States Attorney will produce that. However, the United States Attorney will object to its admission on the ground that it irrelevant to any issue before this court, and on the further ground it is hearsay and——

Mr. Campbell: As to the last ground, the document which you are producing is an official document from the files and records of the OPS, is that correct?

Mr. Dooley: I wouldn't say that. It was a letter written by one person to another. It is in our files.

(Testimony of Benjamin Dix.)

I probably should object on the ground that it is confidential, also.

The Court: I don't see how it could be confidential. It is always necessary to produce if it comes from the file, and if it is kept in the ordinary course of business, it is admissible without any further foundation.

Mr. Dooley: I will object on the ground of its irrelevancy.

The Court: Objection overruled. What I want is the facts in this case. I don't want to decide this case upon a technicality. I want to know what the facts are.

Mr. Dooley: Yes, your Honor.

The Court: If I want to decide this case on a technicality, I might have granted the defendants' motion.

Mr. Campbell: I will renew it, your Honor. [100]

Mr. Dooley: I am not trying to keep the facts away from the court, your Honor. The objection I raise is on the question of validity, and we will discuss that later.

The Court: Well, let's get the facts in and then we can discuss the import of those letters, and it may be that they are immaterial and have nothing to do with this case, but I don't know now.

Mr. Campbell: This document which I will identify for the record, I now wish to offer in evidence as Defendants' exhibit next in order. It is an office memorandum, United States Government, dated February 26, 1953, addressed to James E. Harring-

(Testimony of Benjamin Dix.)

ton, District Enforcement Director, Los Angeles District, from Chester D. Lewis, District Accounting Executive, by Leslie E. Johnson, Cost Accountant, to which is attached a document entitled "Analysis of Costs and Sales of Agricultural Wood Containers to Dealers, Office of Price Stabilization, Los Angeles District Office," which, as I recall, was the work of Mr. Hameetman.

Is that correct, Mr. Dooley?

Mr. Dooley: I don't know. The document will speak for itself.

The Court: It may be received and marked Defendants' Exhibit D.

The Clerk: Defendants' Exhibit D in evidence.

(The document referred to was received in evidence and marked as Defendants' Exhibit D.)

Q. (By Mr. Campbell): You say during the course of these conversations that you and your committee members had with the officials of the OPS, you discussed the fact that it was impossible for you to continue business under the prices as set forth in 142, is that correct?

A. That's right.

Q. What did they say about that?

A. Well, there wasn't too much importance laid to it. They told us——

The Court: That is not the question.

Q. (By Mr. Campbell): What was said?

The Court: The question is, what did they say?

(Testimony of Benjamin Dix.)

The Witness: The attitude was——

Q. (By Mr. Campbell): No, not their attitude. You understand, we are interested in what they said and what you said. If you can't remember the exact words, the substance of what was said, wherever possible, and state who said it.

A. Mr. Wilson said not to worry about it, there wasn't enough handcuffs to put us all in jail, they wasn't going to put us in jail, and they would see what they could do about getting it straightened out for us.

Q. Was there anything said on that occasion about your engaging attorneys for that purpose?

A. No.

Q. On any of the occasions that you discussed the matter with them?

A. Did they say we should engage attorneys?

Q. I am asking if anything was said on that subject. A. No.

Q. Did your people say anything on that subject?

A. I believe we asked if it was necessary to engage an attorney, and Mr. Murray said that the order originated in Los Angeles and could be changed in Los Angeles, but that the regional headquarters was in San Francisco and it would have to go through San Francisco, but they would start it from this point.

Q. Who would start it from here?

A. The OPS would start relief for us from the

(Testimony of Benjamin Dix.)

Los Angeles office to the San Francisco regional headquarters.

Q. Was anything said on the occasion of your meetings there on the subject of whether you should continue operations under Order L-117, rather than the prices set forth in 142?

A. Well, I believe I was the one that told Mr. Wilson that I could not operate on that basis.

Q. On the basis of what?

A. On the basis of 142, and I had either to close my doors or violate the regulation. Mr. Wilson told me not to worry about it, there would be help coming pretty quick. [103]

Q. Was anything said about your continuing under L-117? Did either you or he say anything about it?

A. He didn't say to continue, but they didn't say not to continue. They said not to worry about it, help would be coming.

Q. Was anything said by you about continuing under 117?

A. I told him I had to either continue under 117 or close up, because I did not have enough cash available to operate at a loss for any period of time.

Q. And you were told not to worry about it, is that correct?

A. Yes.

Q. That help would be forthcoming?

A. Yes.

Q. Did you believe in good faith at that time that these officials would do something to concerning that?

A. Yes, I did.

(Testimony of Benjamin Dix.)

Q. Did you then continue to operate under Order L-117? A. Yes, I did.

Q. Did you from then on throughout the period OPS was in effect, that is to say, until the month of January 1953, continue to cooperate with the Office of Price Stabilization and make your records available, supplying them with such information as they required? [104] A. I did, yes.

Q. Did you alter any of your records so as not to show the correct price at which products were sold? A. No, I did not.

Q. Or the parties to whom they were sold?

A. No, I did not.

Q. As a result of your meetings with the Office of Price Stabilization, did you believe that you were acting properly and within the law in continuing to utilize the prices as set forth in Order L-117? A. Yes, we sincerely did.

Mr. Dooley: I object. He says "we." To whom do you refer?

Mr. Campbell: He uses it editorially.

The Court: You are referring to your company?

The Witness: To my company.

Q. (By Mr. Campbell): So far as you know, the other box companies—may I ask this? Incidentally, in this business, it is a very competitive business, is it not? A. Very much so.

Q. Most of you are operating around the market area? A. That's right.

Q. Isn't it a fact that you know what your

(Testimony of Benjamin Dix.)

competitors are doing just about the same time they do the act?

A. Sometimes before. [105]

Q. Your customers all know what the going prices are, don't they? A. Yes.

Q. Then to your knowledge were the other members of the association whom you have testified represented about 90 to 95 per cent of the industry, were they all proceeding on the same price schedules? A. Everybody was, yes.

Mr. Dooley: I object to him testifying as to the others.

The Court: That may go out, as to what the others were doing.

Mr. Campbell: Except, your Honor, he has testified he is very well acquainted with that.

The Court: That may be true. I am very well acquainted with what attorneys do, but I don't know what you do. I know what you are supposed to do.

May I inquire of counsel, is Exhibit 1, Regulation 142, the first printed regulation there was?

Mr. Campbell: That is my understanding.

Q. This 142 is the first printed regulation you received? A. Yes, aside from L-117.

The Court: L-117 was a letter.

The Witness: Was a letter, yes.

The Court: There are just two regulations, L-117 and 142? [106]

The Witness: To my understanding—

Mr. Campbell: There was a general freeze originally, a freeze of the original prices they had

(Testimony of Benjamin Dix.)

December 20 to January 19. These people appealed from that, hired attorneys, and got 117. This is the first printed order that came off the government printing press.

Mr. Dooley: What is that, counsel?

Mr. Campbell: 142.

Mr. Dooley: The general ceiling price regulation.

Mr. Campbell: I say aside from the general ceiling price regulation.

The Court: Let me ask something of counsel. Under the regulations when you attempt to establish the ceiling prices, would they be established arbitrarily, or did you have to have meetings and some kind of agreement between the parties as to ceiling prices?

Mr. Campbell: I understand various situations arose. Generally speaking, in an industry ceilings were frozen as of a particular day, a period prior to the OPS. But necessarily, just as in this industry, it often resulted in inequities as between those competing in the same territory, because they had different prices, depending upon the law of supply and demand as it existed at that time, and under such circumstances the industry could petition the President or his representative, the OPS, who would then, on the basis of study set general [107] price ceilings, which was done in this instance in 117. It is a small industry.

The Court: 117 is kind of a stop-gap order. It doesn't try to distinguish between the different

(Testimony of Benjamin Dix.)

kinds of lugs and crates. It sets forth only four classifications, lugs, three-quarter lugs, wire-bound crates, and vegetable crates. That is only a temporary order. That is a stop-gap order until they can determine what the ceiling prices ought to be. I am wondering this. Could they determine arbitrarily what the ceiling price is going to be?

I notice in Exhibit D we find this statement: "Prices as fixed by CPR-142. There is no data in the files to determine how these grades were fixed. No such base period practice was found."

Could they set a figure without some basis? Was it possible for the OPS to arbitrarily say to these people, "Regardless of what they cost, you can only sell for a certain amount," without any hearing, without giving the sellers the right to appear and protest?

Mr. Campbell: We say not, your Honor.

Mr. Dooley: Well, your Honor——

The Court: Just a minute. I am arguing with Mr. Campbell now.

Mr. Campbell: Our position is this, as previously indicated by this witness here, that the backbone of the industry [108] consisted of certain items which they have taken up with Washington and which were covered under 117.

The Court: L-117 didn't cover the items——

Mr. Campbell: The principal items.

The Court: It didn't say a thing about apple boxes, and this witness has testified that is part of the backbone. It never mentioned apple boxes at

(Testimony of Benjamin Dix.)

all. He said the business depended upon lugs, apple boxes, and lettuce crates.

Mr. Campbell: That is true.

The Court: So they did not say anything about apple boxes.

Mr. Campbell: But there were certain competitive items. I have offered in evidence here what the prices were that they had been obtaining for those.

The Court: Well, that is true. I assume, I don't know, I assume that different prices would be charged for different kinds of lugs.

The Witness: I could clear that up, your Honor.

The Court: You say you can clear it up. All right, you clear it up.

The Witness: Apple boxes are in season at that time of the year. During the month of December and January, apple boxes—well, it is probably an item that keeps us in business and is bringing its price, an equitable price to the dealer, and so we were getting a fair price for our commodity [109] for the apple boxes at that time. We applied for relief from Washington on those items that were major backbone items which were out of season during the freeze time and the freeze period caught us with a low price, so we applied for relief on those low price items, but if the item was in season and bringing a price, there was no concern to ask for more money because we were satisfied.

Q. (By Mr. Campbell): In other words, you were satisfied with the freeze price on apple boxes?

(Testimony of Benjamin Dix.)

A. Yes, we were.

Q. Which is not specifically covered under L-117, but is covered under the general freeze?

A. Yes.

The Court: Do you remember what the freeze price on apple boxes was?

Mr. Campbell: That is in Exhibit B or C.

The Witness: I believe it was 12 cents.

The Court: 12 cents?

The Witness: I believe so.

The Court: I notice in Exhibit D apple boxes are set at 13 cents.

Mr. Campbell: May I answer that for your Honor?

The Court: Yes. Do you think I am looking at the wrong thing? I may be. I was looking under the column that is designated 142. [110]

Mr. Dooley: May I point out, your Honor, under the general ceiling regulation, the price, the maximum price varied with each particular concern, depending on how the concern sold goods during the base period. This is more or less an average that was drawn up by someone. It is not clear, but this particular document more or less gives an average or base period price. The general ceiling did not set dollars and cents figures, sir. It depended on how this particular dealer sold during the base period.

The Court: Will you tell me one other thing? How long after the fixing of the ceiling price did 142 come out?

(Testimony of Benjamin Dix.)

Mr. Dooley: I imagine about a year and a half.

Mr. Campbell: It is over a year, yes, your Honor.

Mr. Dooley: The general ceiling price came out in 1950-1951.

The Court: In other words, they operated under L-117—

Mr. Dooley: L-117 came out in June 1951. They operated from June 1951 up until May 1952 under L-117.

The Court: That is, they operated for a year, approximately a year?

Mr. Dooley: Practically a year.

The Court: Under 117?

Mr. Campbell: That's right. Let me point out, your Honor, this table shows with relation to apple boxes that they got a price of 13 cents, as compared with 12 cents, if [111] they show an average price, which this man showed he was charging in that period. But they also raised the purchase from 5.3 cents to 8 cents, so that they show a cost increase to the buyer of 2.7, and actually a net price decrease of .003, not an increase.

The Court: My understanding is the complaint of this witness is that it is not a question that they limit the selling price, but they raise the buying price.

Mr. Campbell: On that item.

The Court: So that the spread was much smaller.

Mr. Campbell: On some items they lowered the selling price. On some items they raised the buying price. An examination will show that the only

(Testimony of Benjamin Dix.)

net price increase on their own analysis was with respect to strawberry trays, and the part of their business that is strawberry trays——

The Court: Is minute?

Mr. Campbell: Is minute. There are two items that were increased, strawberry trays and orange crates, which were increased by 3.33, but there is one item that was decreased as much as $33\frac{1}{3}$ per cent percentagewise, and the overall picture shows that overall of the boxes and crates, with the exception of those two items, the percentage of the dealer was actually lowered in lieu of the 18 per cent raise which the Act purports to give. That is the meat of the argument of these people as to why they couldn't comply with 142, why they [112] couldn't stay in business if they did.

The Court: I was just looking at 142.

“This regulation establishes dealers' ceiling prices at a level approximately 18 per cent above the projected GCPR base period price level.”

They are talking about the dealers' ceiling price. They don't say anything about the retailers' price to the dealer. They don't say whether they are going to raise that 18 per cent, lower it, or leave it the same. All they were trying to do is to fix a price approximately 18 per cent above the base price.

Mr. Campbell: And they had not done that, your Honor.

The Court: The level of ceiling prices for re-

(Testimony of Benjamin Dix.)

tailers was then set to reflect historical differences between retailers' and dealers' prices.

Mr. Campbell: We say they have not done that because they have narrowed the historical difference.

The Court: "The increase over the GCPR base period prices was necessary since December and January are off season in the produce-growing period and prices for used fruit and vegetable containers are at a seasonally low level * * *

"In formulating this regulation, the Director has consulted with representatives of the industry, including trade association representatives, to the extent practicable under [113] the circumstances and has given consideration to their recommendations."

Q. (By Mr. Campbell): Mr. Dix, were you or to your knowledge any members of the dealers industry consulted by the representatives of the OPS?

A. No, sir.

Mr. Dooley: I object, not only on the relevancy but on the ground that he can only testify as to himself.

Mr. Campbell: I asked as to his knowledge.

The Court: Overruled.

Q. (By Mr. Campbell): What was the answer?

A. They never consulted me and I asked the other dealers——

The Court: You can just say they did not consult with you.

The Witness: All right.

(Testimony of Benjamin Dix.)

The Court: And as far as you know, of your own knowledge, they did not consult with any other dealer?

The Witness: That is true, your Honor.

Mr. Campbell: As your Honor is aware, on this matter of the freeze period, there are comparative prices set forth here, and they were the high prices. In column (f), for example, they give base period high, as they call it, and avocado flats were at 9 cents, and in 142 they are set at 7 cents, a reduction of 2 cents. Under order 117, according to the OPS figures, [114] they were set at 12.

The next item is strawberry trays. That is the one in which there is a raise. The base period high was 4½ cents, and under 142 they are set at 7 cents, which is an infinitesimal item.

The Court: Well, the record speaks for itself.

Mr. Campbell: Yes, it does.

The Court: Let me ask you another question.

Mr. Campbell: Yes.

The Court: Supposing I would come to the conclusion after hearing all the evidence that this was an arbitrary fixing of the prices by the OPS, that the OPS had not consulted with representatives of the industry, they hadn't consulted with anybody, they just arbitrarily fixed these prices. Can I do anything about it?

Mr. Campbell: I think so. Mr. Dooley does not agree.

The Court: Where is your authority?

Mr. Campbell: It is true that the Act provides

(Testimony of Benjamin Dix.)

that the Court of Emergency Appeals and the Supreme Court shall have the power to determine the validity of the Act, nevertheless, I have quoted a case in my memorandum that this court is being called upon to enforce the regulation and has a right to interpret the regulation whether it is determining its validity or not. Where one portion of the regulation is repugnant to the other portion of the regulation, I think the court has the [115] right to determine that.

The Court: Suppose I would say I don't know what they want to do, they say in one place they want to raise 18 per cent, and in another place they don't do it. So I don't know just what they did. Have I any right to throw out the regulation because I don't understand it?

Mr. Campbell: I think your Honor has in an attack of this kind. The cases the United States Attorney is relying on are cases that came into this court when the order was in effect and there they asked the court to prevent by injunction the enforcement, and the court said, "We don't have that power. The Act doesn't give us the power. It is vested exclusively in the Court of Emergency Appeals and in the Supreme Court. That is where you are going to have to go because that is set up for you." But here we have a situation where this court is asked to enforce the provisions of this 142, and I say, first, it is invalid and the court has the power because——

(Testimony of Benjamin Dix.)

The Court: Can you show me where any court has assumed the power?

Mr. Campbell: No, sir, and I can't show you where the court has refused to assume that power directly.

The Court: Do you mean to say this question has never been raised before? It seems unbelievable to me that it wouldn't have been raised. [116]

Mr. Campbell: Not directly, because we have then the further situation where we say that the defendants in this case were deprived or misled from exercising what they should have done at that time under the terms of the Act, to make a direct attack. However, I understood these matters were going to be passed on.

The Court: I was just wondering what your point of view was. I notice it's 3:00 o'clock. We will now recess until 15 minutes after 3:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Campbell): Mr. Dix, during the time L-117 was in effect and prior to April 29, 1952, when 142 was purportedly put into effect, were there any changes—strike that.

Prior to the purported effective date of regulation 142, namely, April 29, 1952, had there been any change in the wage scales which you were compelled to pay your employees in your business?

A. Just about that time we were negotiating with the union for a new contract.

(Testimony of Benjamin Dix.)

Q. At that time were all of your employees under union contract?

A. They were, and we told the union we couldn't negotiate with them because on the basis of the new regulation, we not only couldn't give them any increase, but we couldn't continue [117] to operate.

Q. If 142 was to become effective?

A. Yes, if 142 was to become effective.

Q. Did you, however, as a result of your meetings with the officers of the OPS grant certain increases? A. Yes, we did.

Q. Was that under the belief that 142 was not to be effective and you were to be restored to L-117?

A. That's right.

Q. What was the amount of those increases, do you recall?

A. There was a couple of holidays added in and there was an hourly raise for the truck drivers and the yard workers.

Q. As of the period of time of the price regulation freeze, that is to say December 1950 to January 19, 1951, at that time had you been paying overtime to your employees, do you recall?

A. 1950? I don't recall.

Q. When was your industry first unionized, do you recall that? A. About 1950.

Q. Approximately how many men are employed by you, Mr. Dix?

A. During the season about 50.

Q. During this period of time and immediately prior to [118] the regulation 142, were any rate

(Testimony of Benjamin Dix.)

differentials brought into effect regarding the cost of hauling, that is to say, truck drivers?

A. After the increase in wages?

Q. Prior to 142, immediately prior to 142, aside from your yard employees.

A. The contract came into being right after 142 was issued.

Q. Did that also increase the truck drivers' rate? A. Yes, it did.

Q. From the time of the freeze, that is to say, December 1950, until when 142 came into being, had there been other increases in wages?

A. Yes.

Q. Were any of those increases, to your knowledge, given effect in the prices purportedly set forth in 142? A. I don't quite understand.

Q. I will withdraw the question. At the time or prior to April 29, 1952, the date of regulation 142, you stated, I believe, nobody from the OPS discussed with you proposed changes in the ceiling price, is that right? A. That's right.

Q. Do you know whether or not anyone from that office inspected your records, particularly your invoices of sales to customers? [119]

A. Nobody had.

Q. Do you know whether or not anyone had examined your records with relation to profit and loss accruing from your business?

A. Prior to the regulation?

Q. Yes. A. No, they did not.

Q. Immediately after this 142 came into effect

(Testimony of Benjamin Dix.)

and in the course of your conversations with the officers of the Office of Price Stabilization, did you offer to make available to them all of your books and records, including your income tax returns, for the purpose of showing the profit and loss from such business? A. We did.

Q. Did they avail themselves of that opportunity? A. They did.

Q. This was during the period of time that you stated that they advised you relief would be forthcoming from this order? A. That's right.

Q. Was anything said in the course of these conversations that you recall relative to your engaging attorneys for the purpose of going to Washington in connection with order No. 142?

A. We were going—at one of the OPS meetings, we asked [120] if that was necessary or advisable.

Q. This was after 142 came out in published form?

A. Yes. We asked was it necessary or advisable to hire an attorney to get some relief. We were told that the order originated here in Los Angeles and could be fixed or the necessary changes made here in Los Angeles without going to Washington.

Q. And you believed in good faith that those changes would be made? A. We did.

Q. As I take it, you openly, notoriously, and without any concealment continued to utilize the prices set forth in L-117 and in the original freeze where L-117 did not apply?

A. Yes, we did.

(Testimony of Benjamin Dix.)

Mr. Campbell: You may cross examine.

The Court: May I ask a question here before you cross examine?

Mr. Campbell: Yes.

The Court: Regulation 142 is dated 1952. Were all the sales as set forth in the complaint in 1952 and 1953?

Mr. Dooley: Yes, your Honor.

The Court: May I ask this witness a question? This case was filed May 1, 1953. Were you told at any time before this case was being filed that you were going to be prosecuted for the violation of the regulation 142? [121]

The Witness: No, we were not.

The Court: You had no notice at all?

The Witness: I don't believe so.

The Court: All right. Cross examine.

Mr. Dooley: Your Honor, for the purpose of the record I would like to make a motion to strike all of the testimony prior to May 5, 1952, and all of the testimony pertaining to the validity of the regulation, including the wages paid and the increases in prices for hauling and the testimony going to the yards.

The Court: Your motion is denied. But let me ask you a question, Mr. Dooley.

Mr. Dooley: Yes, your Honor.

The Court: It is a fundamental proposition, as set forth in our Constitution, that a person's property cannot be taken away from him without due process of law.

(Testimony of Benjamin Dix.)

Mr. Dooley: Yes, your Honor.

The Court: Suppose this was an arbitrary action on the part of the OPS and they couldn't operate under this schedule. Wouldn't it be taking away their property?

Mr. Dooley: Well, it may be, your Honor. There is a provision by which the defendants could have, before this suit, and may still after this suit, pursue. Congress has seen fit to set up a special court for the purpose of determining the validity of an OPS regulation. There were three reasons why [122] they did that, two of which are still in existence today.

The Court: Let me ask you another question, Mr. Dooley. OPS is out of existence?

Mr. Dooley: Yes.

The Court: These ceiling prices are out, aren't they?

Mr. Dooley: Yes.

The Court: You are not trying to impress upon the dealers of second-hand boxes that they have to comply with these rules and regulations?

Mr. Dooley: No.

The Court: You are only trying to get the court to grant you a judgment for the so-called over-ceiling prices. It seems to me the solution of this case, if you have any violation at all, it is a technical violation, and so it seems to me you should be willing to accept a nominal payment from the defendants and get rid of the cases.

Mr. Dooley: But the Emergency Court of Ap-

(Testimony of Benjamin Dix.)

peals was set up for one reason because Congress felt persons would be expert in dealing with this——

The Court: Mr. Dooley, I am looking at this from a practical standpoint. Suppose I would go ahead and hold with you, that you are entitled to judgment. It means an appeal to the Circuit. Suppose I didn't hold with you and held with the defendants. That may mean an appeal to the Circuit.

Mr. Dooley: It may. [123]

The Court: You are only fighting for the principle of the thing here. It is not the money involved.

Mr. Dooley: If they have a defense that concerns the validity, the Emergency Court of Appeals was set up for that purpose.

The Court: I wish you would forget the Emergency Court of Appeals for a while. I think the proper solution of this case would be agree to a nominal judgment. They can't violate the law any more. If they are guilty at all, they are guilty of a technical violation.

Mr. Campbell: That was offered, your Honor.

Mr. Dooley: It is within your Honor's power to grant here treble damages.

The Court: Suppose I find these defendants guilty and grant a judgment for \$1.00 in each case?

Mr. Dooley: I don't think that is permitted by the regulation, your Honor. The way the plaintiff views it, it is a question of when——

The Court: These cases many, many times, Mr.

(Testimony of Benjamin Dix.)

Dooley have been settled by an agreement between the parties. Not so long ago Judge Harrison had one of these cases involving sales of automobiles. They weren't tried. They were adjusted between the parties. If these defendants are guilty at all, they are guilty of a technical violation. I am certainly not going to be hard on them. If I find them guilty, I am not going to be [124] hard on them. Why not make some settlement with them?

Mr. Dooley: Of course, a settlement would have to be approved by Washington as far as the plaintiff is concerned.

The Court: What's that?

Mr. Dooley: Any offered settlement by the plaintiffs will have to be approved by Washington.

The Court: If I make a judgment, it won't have to be approved by Washington. Washington won't have anything to say about it at all.

Mr. Dooley: But I was wondering if it is within the court's discretion to refuse to give treble damages.

The Court: It is within the court's discretion to refuse to give any judgment at all.

Mr. Dooley: I don't think so.

The Court: Can't I find for the defendants in this case? If I can't find for the defendants, what is the use of proceeding with the case?

Mr. Dooley: It is not a matter of the plaintiff not wanting the defendants to have their proper remedy. The plaintiff is merely saying that their

(Testimony of Benjamin Dix.)

proper remedy is with the Emergency Court of Appeals.

The Court: You want to get the Emergency Court of Appeals in this case.

Mr. Dooley: Congress set up that court for the purpose of determining the validity. The validity, as you see from [125] the various figures the defendant has brought in, is a maze of economics that requires an expert body that through the years has determined the validity of these regulations.

The Court: But we have before us at the present time, of course the exhibit was admitted over your objection, but we have before us a statement, it is an inter-office memorandum, it is true, to Mr. Harrington, the District Enforcement Director, and they say there is no data in the files to determine how these grades were fixed.

Mr. Dooley: I have asked Washington for more evidence, and they said since the question could not be raised here, there was no point about getting this.

The Court: You tell Washington they better come out to try the case then.

Mr. Dooley: When it was submitted, certain statistical data went along with it, according to my understanding. I think before deciding the question all the facts should be before the court. The plaintiff felt that the authorities were sufficient to show that this is not a question before this court. This court cannot consider the validity. It involves facts and figures and the various data that should be

(Testimony of Benjamin Dix.)

gathered so that the court can consider it. I don't think all the facts and figures are before the court.

The Court: Probably not. You probably have some facts and figures you want to present to the court. [126]

Mr. Dooley: I don't have any I want to present.

The Court: Let's proceed.

Mr. Dooley: All the facts and figures are not available. Some are in storage. If the question of validity arises, all those figures will be gathered together and presented to the Emergency Court of Appeals. If a judgment is rendered here, the judgment will automatically be stayed the minute you allow them to appeal to the Emergency Court of Appeals, and if the Emergency Court of Appeals determines it is invalid, they can vacate the judgment. It is a special body that has passed upon the validity of regulations for years that should determine the question of validity, I mean if they have questioned validity, and plaintiff is perfectly willing for them to determine it, but I don't believe this court has the jurisdiction and I don't believe it should determine it because an expert body that has passed upon regulations year after year ever since the Emergency Price Control Act of 1942 should determine the question. That is the position of the plaintiff.

The Court: All right. Let's proceed with the testimony.

Mr. Campbell: There was a motion to strike.

(Testimony of Benjamin Dix.)

The Court: The motion to strike is denied, Mr. Dooley.

Cross Examination

Q. (By Mr. Dooley): Mr. Dix, you stated in your testimony this morning [127] that the defendants comprise about 95 per cent of the industry, is that correct? A. That is true.

Q. What area were you referring to?

A. What other area is there in Southern California?

The Court: Were you referring to Southern California?

The Witness: Yes, your Honor.

Q. (By Mr. Dooley): How many defendants are there here, do you know?

Mr. Campbell: There are 14, the record shows. 15, counting one that is absent. 14.

Q. (By Mr. Dooley): I show you Defendants' Exhibit A in evidence and refer you to the list of companies at the end there and ask you from your knowledge are those companies in the box and crate business?

Mr. Campbell: If you say they are, I will stipulate they are.

Mr. Dooley: Well, I am not sure. I am asking him.

The Witness: I will say they are, except some of them are out of business.

The Court: Well, they were at that time, were they?

The Witness: They were at that time out of business.

(Testimony of Benjamin Dix.)

Q. (By Mr. Dooley): Did you check the number of defendants there? A. No. [128]

Mr. Campbell: There are 26 firms listed there.

The Court: Will you stipulate there are 26 firms? That is argument. The evidence is before the court.

Q. (By Mr. Dooley): Will you still say that the defendants comprise 95 per cent?

A. Yes.

Q. Now, the number here——

The Court: Just a minute.

Mr. Campbell: There is confusion there.

The Court: His testimony was 95 per cent of the volume, not 95 per cent of the merchants, but 95 per cent of the volume of the business done.

Q. (By Mr. Dooley): Were you speaking of the volume in Los Angeles County?

A. Well, we cover all Southern California.

Q. Do you know whether there are any dealers in Imperial County? A. None.

Q. Inyo County?

A. Where is Inyo?

Q. It is in Southern California.

Mr. Campbell: Bishop and Independence.

The Witness: What big city would it be near?

Mr. Dooley: I am not familiar with that. These counties are enumerated. [129]

The Witness: There are two second-hand dealers in Imperial County.

The Court: Do you mean to tell me you think there is a second-hand dealer in Inyo and Mono

(Testimony of Benjamin Dix.)

County? There aren't any boxes there. You could put them all in one crate.

Mr. Dooley: These are in the order. If his statement that they comprise 95 per cent of the volume——

The Court: If there is a dealer in Inyo or Mono County, they wouldn't do one tenth of one per cent of the business done in this area.

Q. (By Mr. Dooley): What about San Diego County?

A. Since your regulation has come out—before the regulation, there was one dealer. Since the regulation, he has gone out of business. There are two more dealers.

The Court: That makes three all together?

The Witness: At this time there were three, yes, your Honor.

Q. (By Mr. Dooley): You stated this morning Mr. Alvarado purchased all of his containers from the Safeway Stores, is that correct?

A. To my knowledge, yes.

Q. How extensive is your knowledge?

A. If I don't know what my competition is doing, I don't know how I am going to be doing.

Q. So you check up on your competition?

A. Yes, pretty well. [130]

Q. Just how do you check upon your competition?

A. I know exactly what sources of supply are available and I know who is getting business from the sources of supply.

(Testimony of Benjamin Dix.)

Q. You make a special check on each of the dealers in the business? A. Definitely.

Q. I believe you stated this morning you were one of the biggest dealers in the area, is that correct? A. I think so.

Q. You stated you were pretty familiar with the industry. A. Yes.

Q. And you check up on the various companies. Now, what is the volume of your business per year?

The Court: In dollars and cents?

Q. (By Mr. Dooley): Approximately.

A. Over half a million.

Q. Half a million dollars gross, and yet you stated this morning you were not familiar with your customers?

A. I didn't say I didn't know who they were.

Mr. Campbell: That is a misstatement of the record. He stated he knew who he sold to, but he didn't know what they did with the boxes.

Q. (By Mr. Dooley): You were not able to give the percentage sold to traders and packers?

A. No.

Q. And yet you give the number of your accounts as 300 accounts? A. Yes.

The Court: Approximately 300.

Q. (By Mr. Dooley): You referred to a meeting during May 1952, did you not? A. Yes.

Q. And you stated that Mr. Wilson and Mr. Murray were at that meeting? A. Yes.

Q. Did you hear Mr. Murray tell you in effect

(Testimony of Benjamin Dix.)

CPR 142 was the law and until it was changed you would have to comply with it?

A. I didn't understand it to be that way.

The Court: No, that is not the question. Did you hear him say that? You can answer that yes or no.

The Witness: No.

Q. (By Mr. Dooley): You did not hear that? At that meeting did anyone directly tell you to continue to price under order L-117?

A. Directly is a funny word.

The Court: Mr. Dooley, he already testified nobody told him to continue under that directive L-117 and nobody told him not to. You are trying to get him to change his testimony. He [132] said nobody told him to continue and nobody told him not to continue.

Q. (By Mr. Dooley): Did you ever receive any information that CPR 142 had been changed or amended? A. No.

The Court: I think it can be stipulated, can't it, that CPR 142 continued until the end?

Mr. Campbell: It died with the agency.

Mr. Dooley: Yes. I wanted to get his knowledge as to whether he had heard anything of that nature.

The Court: May I ask a question here, counsel? Did CPR 142 establish a price less than the original ceiling price in any commodity?

Mr. Campbell: Yes, your Honor.

Mr. Dooley: I am unable to state, because I don't have any facts.

Mr. Campbell: I can state that it does, based

(Testimony of Benjamin Dix.)

upon Exhibit D, also based upon Exhibits B and C. I was going to use that in my argument. There are specific instances.

The Court: Assuming just for the purpose of an argument that regulation 142 used a ceiling price which was lower than—I am talking about a selling price, not a buying price, a selling price of the defendants—assuming that it sets a ceiling price lower than the original freeze price, did they have a right to do that, did the government have a right to come into [133] an industry and say, “It is true your prices at the time the freeze went into effect were 100 per cent, but we think you are making too much money, so we will set your price at 75,” can the government do that?

Mr. Dooley: I am not sure as to the validity of that, as the plaintiff is of the position the validity is not in question before this court, and to delve into that question, I wouldn’t be able to answer.

The Court: You are prosecuting under a certain regulation. Don’t you think the defendants have a right to test out this regulation?

Mr. Dooley: Yes, your Honor.

The Court: Any place other than the Emergency Court of Appeals?

Mr. Campbell: Now, your Honor, it is in Philadelphia. They used to travel around, but it is all now in Philadelphia.

Mr. Dooley: In the first place, they had an opportunity to protest the regulation if they felt it

(Testimony of Benjamin Dix.)

was unfair. That was within six months after the passage of the regulation.

The Court: Suppose the basic law said that the price on a commodity should be 100, and then by regulation the OPS came along a year later and set the freeze price or ceiling price at 75. Could they lower the OPS price, the ceiling price below what the parties were getting at the time the freeze went into effect? [134]

Mr. Dooley: That is a question that, as I said, I can't say definitely just as to their powers, but I can say, your Honor, they had an opportunity to protest to the Administrator and if the protest was denied, that is even before suit they had that opportunity, they could appeal to the Emergency Court of Appeals then. Now they have an additional chance. I mean I won't say because it would involve a lot of questions of law as to the powers and extent of the Price Administrator in promulgating regulations.

The Court: All right. Proceed. I raise these questions as I think about and as we come to them.

The Witness: Is the government going to supply us with attorneys to do all this?

The Court: You can't argue. You can just answer questions, but don't argue.

Q. (By Mr. Dooley): Did you know, Mr. Dix, where regulation CPR 142 came from?

A. Would you repeat that.

Q. Did you know, Mr. Dix, who promulgated ceiling price regulation 142?

(Testimony of Benjamin Dix.)

A. No, I don't know.

Mr. Campbell: I submit that is a matter of record.

The Court: The witness says, "I don't know."

The Witness: You mean the individual's name?

The Court: The answer is you don't know. [135]

Mr. Dooley: I have no further questions, your Honor.

Mr. Campbell: That's all.

The Court: You may step down.

(Witness excused.)

Mr. Campbell: I understood you had a witness you wanted to take out of order.

Mr. Dooley: Yes.

Mr. Campbell: I have no objection.

The Court: All right. It's awfully late in the afternoon now, though.

Mr. Dooley: I have someone here I should like to put on.

The Court: All right.

CHRISTIAN V. MURRAY

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Christian V. Murray.

Direct Examination

Q. (By Mr. Dooley): What is your business or profession, Mr. Murray?

A. I am an attorney-at-law. [136]

(Testimony of Christian V. Murray.)

Q. On or about May 1952, what was your occupation?

A. I was an attorney-advisor in the local Office of Price Stabilization in Los Angeles, California.

Q. How long had you served in that capacity?

A. I started in June of 1951. I had been about a year at that time.

Q. During May 1952 were you present at a meeting between officials or employees of the Office of Price Stabilization and representatives of the Los Angeles Box and Crate Dealers Association?

A. I was. I believe there were two or three meetings in May.

Q. Take the first of these meetings. As you recall it, who else was present at that meeting?

A. At the first meeting, which was around the 5th of May——

Mr. Campbell: I did not get that.

The Witness: It was around the 5th of May, might have been a day before or a day after. I recall there was Mr. Wilson, Mr. Hameetman from the Office of Price Stabilization, there was Mr. Dix and four others from the box and crate industry. Three of those four I recall in the courtroom. I don't know whether the fourth is here. I have forgotten him. But there were five all together.

Q. (By Mr. Dooley): Will you point out the members that [137] you see in the courtroom today who were present?

A. Yes, I think it is Mr. Ginsberg and the gentleman over here.

(Testimony of Christian V. Murray.)

Mr. Campbell: From the Star Box.

The Witness: And the other gentleman beside Mr. Dix.

Mr. Campbell: Mr. Sobelman.

The Witness: There was one other. I don't see him in the courtroom now. He may be in the courtroom and I just don't recognize him.

Mr. Campbell: Mr. Ohanesian, is that the gentlemen you refer to?

The Witness: I couldn't say definitely, but it may be so.

Q. (By Mr. Dooley): In what capacity did you attend this meeting, Mr. Murray?

A. Well, I was an attorney-advisor to the industrial section and I received a telephone call asking if I could attend a meeting in the office of the chief of that section. When I arrived there, I found the five gentlemen with Mr. Wilson and Mr. Hameetman. The meeting had evidently been in session prior to my arrival and they asked me several questions after I got there.

Q. What questions were those, Mr. Murray?

A. The first question was as to the effect of the ceiling price regulation 142. [138]

Mr. Campbell: May we have the parties that asked the questions?

Mr. Dooley: Does the court have a ruling on that?

The Court: Yes. Can you give the names?

The Witness: Yes. Mr. Wilson asked me, "Will

(Testimony of Christian V. Murray.)

you explain the effect of this regulation No. 142 to these gentlemen?"

I explained that it was a regulation issued by the Director of Price Stabilization, that it affected the Southern California area and by its terms was made effective on May 5, 1952. There was quite a discussion following about prices and possible loss.

I was again asked if there was any way, Mr. Wilson, I believe, asked the question again, that this regulation could be stayed in its effect until the local office had a chance to determine facts.

I again explained that the office in Los Angeles, the district office, had no authority, had no power to change or stay the effect of any regulation, that that power was solely in the Washington office, in the Director's office.

Q. What else, if anything, did you say to them?

A. Well, the next item was what could the members of the industry do.

I then explained from the price procedural regulation the system of a protest, application for adjustment or amendment. [139]

I was asked how long it took to get a protest through.

I had to answer from my personal experience it was not very satisfactory, and usually it was several months.

They did ask would it be necessary to retain an attorney to file a protest.

I answered that it was not necessary, but it was

(Testimony of Christian V. Murray.)

a technical application and sometimes attorneys were advisable.

I was asked if there was anything that the local office could do inasmuch as the regulation had been initiated in the Los Angeles office.

I answered that if a protest were filed, based upon my prior experience, it would be sent to the local office for recommendations and determination of certain facts, and since the regulation had initiated in the Los Angeles office, I felt that the same effect or result could be attained by the local office submitting to the Washington office a re-survey of its facts.

That is in effect what was agreed upon at that first meeting, that facts would be determined and that the local office would submit to the national office for further consideration and recommend a change.

Q. You listened to the testimony of Mr. Dix, did you not? [140] A. Yes, I did.

Q. He made the statement that you said that the regulation originated with the Los Angeles office and could be changed in the Los Angeles office. Did you make any such statement?

A. No. Probably it was a misunderstanding. I do recall explaining that the local office had entirely delegated authority, that none of the offices outside of the office in Washington had any power or authority to suspend the operation or to change or amend one of the regulations, that all we could do was recommend to the national office.

(Testimony of Christian V. Murray.)

Q. Mr. Dix also stated that at this meeting Mr. Wilson said to the effect that there were not handcuffs to put all of them in jail, that they need not worry. Did you hear Mr. Wilson make that statement?

A. I heard a statement to that effect. I wouldn't say it was exactly in those words. But, frankly, it was a pleasant meeting. I mean personally we were quite friendly and there was an exchange of banter, shall we say.

Q. Was that statement made by Mr. Wilson?

A. In effect it was, yes.

The Court: May I ask a question?

The Witness: Yes, your Honor.

The Court: Did you, subsequent to this meeting, present the matter to Washington and recommend a change? [141]

The Witness: The office did, your Honor.

The Court: The office did?

The Witness: The office did, yes.

The Court: All right.

Q. (By Mr. Dooley): That was the first meeting. Was there another meeting?

A. There was another meeting about, oh, I would say a week, perhaps, later. That is the meeting at which Miss Frances Lavine was present and it was at that meeting that it was determined to send out the accountants to examine the books to determine what the impact was. They had then operated about a week with the new regulation in effect, and it was to determine what the changes

(Testimony of Christian V. Murray.)

were between the prior operation and the new regulation.

On May 16, I wrote a memorandum to the chief of our accounting section asking that he detail one of his accountants to make a survey in the box and crate industry.

Q. At this second meeting, were the same persons present, to your knowledge?

A. At least three were the same. I am not sure if all five were there. I know Mr. Dix was present at all the meetings I attended, and I believe Mr. Ginsberg was, and I think Mr.—the gentleman behind you. I recall those three definitely at all meetings, but I am not sure whether the other two were the same or not. [142]

Q. Did you have occasion to make a statement at this meeting to anyone?

A. At the second meeting?

Q. Yes.

A. Well, at all meetings I was called upon to explain the regulations, if that is what you mean.

Q. Did you have anything to say concerning the legal effect of the ceiling price regulation 142?

A. I can't be sure at which of the three meetings statements were made. I know at the first meeting the question uppermost was whether the regulation was in effect and had to be observed, and that was definitely answered that we had no power to——

Mr. Campbell: As to this last, I will object. Let's have the witness give the conversation.

(Testimony of Christian V. Murray.)

The Court: He is giving the conversation.

Mr. Campbell: He is giving an interpretation.

The Witness: This was again in answer to Mr. Wilson's query, what could be done with these men.

Mr. Campbell: My objection was, "They were definitely told so-and-so."

The Court: It is what you said to this delegation, that is what we want to know.

The Witness: In answer to a question which, as I recall, came from Mr. Wilson, I advised them that that regulation [143] was a law and that in the local office, the Los Angeles district Office of Price Stabilization, there was no one who had authority to suspend or hold in abeyance its operation, that it was in effect as of the date specified, May 5.

Mr. Dooley: No further questions. You may cross examine.

Mr. Campbell: Shall I proceed?

The Court: Yes, let's proceed.

Cross Examination

Q. (By Mr. Campbell): Mr. Murray, you say you attended at all three meetings of this nature?

A. Three in May. I was in another meeting in about February of last year.

Q. Four all together?

A. Yes. That was much later. That was in the enforcement office then.

Q. Each time you were present, I take it, you were present at the request of Mr. Wilson, who was head of the division?

(Testimony of Christian V. Murray.)

A. I was invited to the meeting, yes.

Q. By Mr. Wilson? A. Yes.

Q. I take it you don't know if other meetings were held [144] at which you were not present?

A. I don't, no.

Q. As a matter of fact, Mr. Murray, with relation to this regulation 142, that was submitted to you locally for your examination prior to the date it was ever signed in Washington by the Director of Price Stabilization, was it not? A. Yes.

Q. At that time your opinion was asked as to the form in which the regulation was set up.

A. The legal sufficiency of the form, yes.

Q. Did you at that time go into the economic figures which make up the sense of this order?

A. No.

Q. You had nothing to do with that?

A. No.

Q. At the time you examined this order in connection with your official capacity as advisor to the section, did you examine any figures to determine whether or not this order actually accomplished the purpose which is set forth as the attempted purpose, Mr. Murray, in its preamble?

A. I considered only the form. I did not consider the factual data in the order.

Q. You didn't consider the substance of the regulation at all?

A. My function was purely on the form and the legal sufficiency. [145]

(Testimony of Christian V. Murray.)

Q. In other words, whether the t's were crossed and the i's dotted?

A. Well, roughly so.

Q. Isn't it a fact that at that first meeting which you attended, which you say was in session when you came into it, that it was agreed by all of the parties present that economically the used box industry composed of dealers could not operate except at a loss under this 142?

A. That was a statement I heard.

Q. You not only heard those statements, did you not, from the box men or their representatives, but also such facts were agreed to by the officials of the OPS who were present?

A. I don't recall any agreement. The agreement, if any, was that it appeared to be from what they told us, and that is why it was determined to have the accountants go out and resurvey the facts.

Q. It was then the determination of these meeting that the situation was at least serious enough to require an appraisal of the economic status of the industry, isn't that correct?

A. That was our opinion, yes.

Q. Did anyone who was present at these meetings which you attended of the OPS take the position that the box companies could operate under 142, could operate economically? [146]

A. No, I don't recall anyone taking that particular position.

Q. At the time that you approved this regulation prior to its being signed in Washington, did

(Testimony of Christian V. Murray.)

you have before you or were you shown any figures by which the ceiling prices as set forth in 142 were arrived at?

A. I saw some sheets but, frankly, I do not recall what was in them.

Q. Did you even examine them? Were you called upon to examine them in connection with the work you did on 142?

A. No. I politely listened while they told me, but I didn't have to make any decision as to the factual matters.

Q. Who was supplying the information on the factual matters?

A. Mr. Hameetman, who was the commodity analyst or business specialist handling the lumber products division. I think he said he surveyed the market and gathered the facts.

Q. Do you know whether or not he had in the course of that survey made any examination, either orally or of the records of any of the dealers who purported to be affected by this order?

A. Of my own knowledge, I do not know.

Q. Isn't it a fact that during the course of these meetings the representatives of the box companies made the point that they had never been consulted with reference to the prices [147] set forth in 142?

A. I do recall one statement, I believe Mr. Dix made it, and I think it was in the first meeting, at which Mr. Hameetman was present, where Hameetman had said he checked the industry.

(Testimony of Christian V. Murray.)

I can recall Mr. Dix saying, "Well, I would certainly like to know whose plant he went to."

Q. What did Mr. Hameetman reply?

A. He replied, gave a couple of names, but who they are now, I have no idea.

Q. Isn't it a fact that in the course of this meeting and in your presence it was stated by one or more of the officials of the Office of Price Stabilization present that while all orders or changes to orders were issued over the signature of Washington, that the local office of the Office of Price Stabilization was the originating body for any regulations and that any changes made in an existing regulation would be only after consultation with the local office?

A. I think I explained that myself to them, that any regulation originating in Los Angeles would be referred back to Los Angeles for re-appraisal.

Q. So that although required by the statute, the Director of Price Stabilization, who at that time was Ellis Arnall, was required to place his signature on any regulation for it to become effective, and he was also required by the statute under his delegated authority from the President to approve [148] of any amendment, nevertheless it was a fact, was it not, that the actual formulation of any regulation affecting the box industry in Southern California would originate and be approved by the local Office of Price Stabilization?

(Testimony of Christian V. Murray.)

A. It would either originate or at least be coordinated with, that is true.

Q. And isn't it a fact that these people were given to understand in words or in substance at that time that although Washington nominally was the signatory party, that the responsible office in formulating the regulations with respect to their business was the Los Angeles Office of Price Stabilization? A. That is correct.

Q. And isn't it a fact when these people inquired during times you were present as to whether specifically they should again engage the firm of Snyder & Snyder, who had represented them in obtaining order L-117, they were advised by one or more of the officials present that that would not be necessary since the recommendations would be made by the local office, who would familiarize themselves with the economic situation of the industry?

A. I do not recall anyone advising them not to retain Snyder & Snyder. I do recall being asked——

Q. I meant no implication that you were not advising them to hire any specific attorneys. I used that name because [149] it might refresh your recollection. Go ahead.

A. I believe I testified before I do recall some of them asking if it were necessary to retain counsel in order to file a protest, and I believe my answer to that it was not a requisite or necessity, but it was a technical type of procedure and they should have legal counsel, if they could. As I recall, there

(Testimony of Christian V. Murray.)

was some question about cost and we were asked if we would help if they wanted to do it without counsel.

Again we said we would render every assistance we could.

Q. Wasn't the upshot of those negotiations it was considered by all parties that protest had been filed with you by reason of these meetings?

A. A technical protest described in price procedural regulations was discussed and it seemed to be the consensus of opinion that it would be an unnecessary waste of time because it used to take months.

Q. And for that reason it was the understanding of the parties, was it not, that by the meetings there in bringing these matters to your attention that they were protesting his regulation as being one which they could not economically continue to do business under?

A. There was a definite protest at those meetings, that's right.

Q. That was so considered by all parties, was it not, I mean as far as the Office of Price Stabilization?

A. We considered it as an objection to the regulation.

Q. Did not the Office of Price Regulation thereafter, immediately thereafter, and at least in part through a written request commence a survey for the purpose of relieving these people from ceiling price regulation 142?

A. That is correct.

Q. Isn't it a fact that one or more responsible

(Testimony of Christian V. Murray.)

officials of the Office of Price Stabilization reported to Washington in writing, making recommendations that ceiling price regulation 142 be abandoned and considered of no force and effect?

A. I can't recall an absolute abandonment of it, counsel.

Q. What do you recall in that regard?

A. I did not write any of the communications myself.

Q. Didn't one of the other attorneys there write such a communication?

A. I don't believe so. In the division of responsibility in a matter which came in, both the commodity section and the legal section participated. If it was a matter pertaining to a section, which this was, the commodity section, the procedure on carrying out the policy, as we termed it, is that the memorandums were initiated in Mr. Wilson's office, in our system they had to go through San Francisco and be acted [151] on in San Francisco, before they got back to Washington.

Q. Through the usual cumbersome channels?

A. Very cumbersome. I do recall having brought before me just for my information, you might say, or interest, memorandums which were just about on their way to being mailed.

Q. When was that in point of time?

A. Some of them were several months afterwards.

Q. Those were the first memorandums you recall as a result of these meetings going forward to Washington?

(Testimony of Christian V. Murray.)

A. No. They were memorandums earlier in that period. As a matter of fact, the regional office sent down a representative to survey the matter, not only in Los Angeles, but in San Diego, and I believe it was a lady. I don't recall her name, but she visited some of the box plants. I know one of our men took her out.

Q. Was her name Isabel Grant?

A. No. Isabel Grant, I believe, had left the organization by that time, but I wasn't in on that week-end——

The Court: Do you know of your own knowledge any letters were written to Washington or to the regional office suggesting the abandonment or modification of regulation 142?

The Witness: I would say letters, your Honor, which were to be mailed. I can't say definitely they were mailed.

The Court: May I suggest to counsel, can you get the letters? [152]

Mr. Campbell: I made a request for the letters.

Mr. Dooley: I have written asking for the letters. I haven't received a reply. I also wrote to Washington asking for statistical data, but they said it was—well, that was immaterial.

Mr. Campbell: I have previously made a request, and I was going to renew the request at this time, requesting a specific letter written by the legal section to Washington. I take it from your statement to the court you are unable to produce such a letter.

(Testimony of Christian V. Murray.)

The Court: Have you got any secondary evidence?

Mr. Campbell: If he doesn't have the letter, I intend to produce something.

Mr. Dooley: If the letter pertains to validity, I was not able to obtain it.

Mr. Campbell: No, this letter was pertaining to the enforcement of regulation 142, a specific recommendation made.

Q. Do you recall a letter on that subject?

A. I beg your pardon, counsel?

Q. Do you recall a letter on that subject pertaining specifically to the enforcement of 142 and the recommendations of the local office with respect thereto?

A. I don't have a concise recollection of it, counsel. I do know there were several memos went forward, and that the local office definitely wanted some change made. [153]

The Court: You say the local office wanted some change made?

The Witness: That's right.

Q. (By Mr. Campbell): Do you recall specifically that these letters which you saw and which were, you say, in the course of mailing, and you presume later were mailed, made a recommendation that these people be relieved from this situation?

A. They more or less recited the facts and asked for consideration to be given to any suggested change.

(Testimony of Christian V. Murray.)

Q. And didn't they recommend that the changes be made, or were they simply fact recitals?

A. No, they went beyond a recital of facts.

Q. They did make recommendations?

A. Yes.

Q. I take it you do not recall at this time the precise recommendations?

A. I had so many things.

Q. You had other industries as well?

A. Yes.

Q. It seems to me you stated you personally on May 16, 1952, in connection with the meetings and the requests for help or assistance from the box dealers, that you personally wrote a letter requesting that a survey be made. Up until the time you left that office in January 1953, had you ever [154] received a survey?

A. Oh, yes. Mr. Kimball, an accountant, was detailed to make the survey, and he came back in later and showed me his spread sheets and explained the effect of them.

Q. Of Order 142?

A. Well, he was explaining what he found in the books and the projection, I believe, of 142.

The Court: The books of whom?

The Witness: He went to some of the defendant organizations.

The Court: All right.

Q. (By Mr. Campbell): I am going to show you Defendants' Exhibit D and ask you if you ever saw that document which is dated February

(Testimony of Christian V. Murray.)

26, 1953, particularly Schedule A attached thereto, being headed Analysis of Costs and Sales of Agricultural Wood Containers to Dealers.

A. No, I don't recall seeing this, counsel.

Q. Did you see a similar schedule to this?

A. The schedule which I recall seeing had the names of firms and the year so-and-so.

Q. When did you receive that?

A. I didn't receive it. Mr. Kimball brought it in to show me what he found. That should be in the OPS file.

Q. How long after your request that such a survey be made was it that you saw that? [155]

A. Honestly, I don't know, counsel, but I assume it was probably within a month or six weeks.

Q. Do you know what happened to that afterwards when Mr. Kimball took it away?

A. No, I really don't know.

Mr. Campbell: I will ask at this time that the government, if possible, produce that particular survey.

The Court: Will you produce any records you can, and if you can't, I will have to admit secondary evidence.

Mr. Dooley: I have no records pertaining to that situation. The government takes the position all of this evidence is immaterial.

The Court: I know what your position is, Mr. Dooley, but, nevertheless, the defendants have a right to present their theory and philosophy to the court. They have a right to have these records if

(Testimony of Christian V. Murray.)

they are obtainable. If you can't get them, I will allow secondary evidence.

Mr. Dooley: I am willing to have secondary evidence admitted if the court considers it relevant.

The Court: I suppose I can have a stipulation at this time that this schedule which is attached to Exhibit D and attached to a letter dated February 26, 1953, was prepared on or about February 26, 1953. This is a schedule that was produced and developed at about the time this letter was written, is that correct? [156]

Mr. Dooley: Yes.

Mr. Campbell: Yes. I am through with the witness, your Honor.

The Court: Have you any other questions?

Mr. Dooley: No further questions.

The Court: May this witness be excused?

Mr. Dooley: As far as I am concerned, your Honor.

Mr. Campbell: Yes, he may be excused.

The Court: You may be excused.

(Witness excused.)

The Court: Well, I notice we didn't get through today. We will now recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., Friday, February 12, 1954.) [157]

The Court: Before we proceed, I would like to ask counsel a question. What was the saving clause in these cases when OPS went out the window?

Mr. Dooley: I think that was in 50 USCA Appendix 2156, your Honor. Your Honor, it is almost at the end of the 2156.

The Court: I might ask defense counsel, have you done any research upon this question of the right to prosecute this action?

Mr. Campbell: No, sir, I have not, your Honor, other than the examination of 2156.

The Court: I might ask the United States Attorney, have you got any cases, have any courts ruled that the right to prosecute an action like this survives after the termination of the authority? Have you done any research except to read the Act?

Mr. Dooley: Not except to read the section, your Honor.

The Court: All right. You may proceed. Call your next witness.

Mr. Campbell: Mr. Ginsberg. [159]

ISADORE GINSBERG

one of the defendants herein, called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Isadore Ginsberg.

Direct Examination

Q. (By Mr. Campbell): Mr. Ginsberg, what is your business or occupation?

A. Box and crate dealer.

Q. What is the name of your concern?

A. Growers Box and Crate Company.

(Testimony of Isadore Ginsberg.)

Q. You are one of the defendants in one of these actions? A. Yes, I am.

Q. Growers Box and Crate Company, is that a partnership? A. No, that is individual.

Q. That is the name under which you operate?

A. Fictitious firm name.

Q. Is your concern one of the larger concerns engaged in the purchase and repair and resale of agricultural containers?

A. I would say so.

Q. There was testimony here yesterday to the effect that [160] the 14 concerns that are represented in these actions represent 90 to 95 per cent of the used box industry, is that right, in accordance with your estimate as well?

A. I would say so.

Q. Approximately, to your knowledge, how many were there engaged during the year 1953 in this particular business in the Southern California area? A. Oh, possibly 25.

Q. Possibly 25. As I understand you, the 14 represented here represent 90 to 95 per cent.

A. I am talking about the whole Southern California area, but we are 95 per cent of the Los Angeles area.

Q. Now, Mr. Ginsberg this is, is it not, a highly competitive line of business?

A. Yes, it is.

Q. How long have you been engaged in the business? A. Since December 1937.

Q. As a matter of fact, the greater number of

(Testimony of Isadore Ginsberg.)

concerns are located in a fairly confined area of the city, are they not? A. Yes, they are.

Q. It is also a fact, is it not, that each of you are pretty generally familiar with the sources of supply of used boxes and the places of sale of the rehabilitated boxes by your competitors? [161]

Mr. Dooley: Your Honor, I will object to the leading questions. If the defendant will phrase his questions less leading, I will have no objection.

Mr. Campbell: I will withdraw the question.

Q. Mr. Ginsberg, do you endeavor at all times to keep yourself posted on what your competitors are doing?

A. If I did not, I wouldn't be in business. I have to know what each and every one of my competitors is doing, where they are buying, who they are selling, try to find out their sources.

Q. How often do you keep that check on your competitors? A. Daily.

Q. Do you attempt to familiarize yourself with the prices which they are paying for boxes?

A. Certainly.

Q. And are such prices as are being paid for boxes generally known throughout the produce industry? A. Yes, they are.

Q. Do you attempt to familiarize yourself daily with the prices at which they are selling boxes?

A. Yes, I do.

Q. Let me ask you this, Mr. Ginsberg, based upon your experience in this industry since 1937, will you state what your experience has been as to

(Testimony of Isadore Ginsberg.)

sales prices by yourself and your competitors, that is to say, are the prices offered by [162] the individual concerns exactly the same or within a very close range of being the same daily?

A. Buying prices?

Q. Selling prices. A. Yes, they are.

Q. Incidentally, some emphasis has been placed during these proceedings on the sale of boxes to packers. Does the sale to packers represent a large portion or not of your business?

A. Well, I wouldn't say it is a large portion.

Q. What are your principal sources to which you sell boxes?

A. Well, we sell them to growers and truckers and shippers and packers and anybody who comes in and wants to buy them.

Q. Of course, here in Southern California, we always think of the orange industry as being one of our largest agricultural industries. As a matter of fact, does the purchase and resale of orange crates play any particular part in your business?

A. Well, we have got a peculiar situation on orange boxes for this reason, that in the Los Angeles area, particularly in California, actually most of the fruit that is shipped into the Los Angeles market is considered cull fruit. It isn't the fancy fruit. The fancy fruit is wrapped and packed [163] and shipped in new boxes to the East, and all we get here in Los Angeles is what is shipped in boxes loose, and the wholesale citrus dealer or orange

(Testimony of Isadore Ginsberg.)

dealer charges the retail store a 15-cent deposit on those boxes. They are charging that now and it may vary from time to time.

Q. Where they are buying packed oranges?

A. No, they are loose. There is very little packed fruit sold in the Los Angeles area. There is very little sold, so consequently the stores pay a deposit upon the boxes and the reason we don't handle many of them, and we are not generally concerned with them, is because when we go to the store to buy those boxes, he says, "I want my 15 cents back," and we say, "We can't pay you 15 cents because we have got to resell them for that price." So consequently a lot of people we are buying boxes from don't sell us the orange boxes.

Q. It is a fact, is it not, that practically all the orange packing plants where they pack wrapped fruit construct new boxes on their own premises?

A. That is true.

Q. And those boxes are shipped out of state and do not, therefore, come back into the used channels in California?

A. That's right.

Mr. Dooley: I object again to counsel framing a question and asking him for yes or no. I consider that leading. [164]

The Court: I think it is leading, but I don't know of any harm that is done. Try not to lead the witness.

Mr. Campbell: Yes.

Q. Now, Mr. Ginsberg, I will ask you, in the first place, when the OPS came into effect, your

(Testimony of Isadore Ginsberg.)

business, of course, came under the general order, is that correct? A. Yes, it did.

Q. Will you state with relation to that period, that is to say, the period December 20, 1950, to June 19, 1951, will you state how market conditions in that period varied, if any, from market conditions in your industry during the balance of the year?

A. Well, we in the produce container business have a peculiar situation where in the winter months boxes and crates naturally are not selling as well as they would in the summer months, because there aren't as many crops to harvest. Consequently, we become blocked up with merchandise, it is sitting outside, it gets weather-beaten, and we run out of space and we need money to carry on our operations, so we sell a lot of boxes and crates for a lot less than what they are actually worth, because we are under that pressure for space and we have to unload a certain amount of merchandise to get money. So consequently when the GCPR came through, we were caught with a low ceiling price because that was not the true picture of our prices, and we were handicapped. [165]

Q. Incidentally, in the used container business here in Southern California, are there certain types of boxes which constitute the bulk of your business, your sales? A. Yes, there are.

Q. What are those?

A. Well, I would say lugs, lettuce crates, apple boxes, those three items.

(Testimony of Isadore Ginsberg.)

Q. Incidentally, in connection with lugs there is a distinction, is there not, in the industry as to lugs and so-called field boxes which were used for packing purposes?

A. We don't have a category called a field box, but they do use some of the lugs for field boxes.

Q. But I am referring to field boxes as boxes which are put in the hands of the packers in the field.

A. Yes. They do use lugs for field boxes, but we call them a lug.

Q. But those particular boxes are used again and again by the same group of packers, are they not?

A. That's right.

Q. Their daily compensation is based on the number of boxes they pack, and the loose fruit is then taken to the packing yard and re-packed in shipping containers?

A. That's right.

Q. Now, immediately after the general ceiling price came into effect and you were frozen with the prices which [166] were in effect in January 1950 and February 1951, will you state whether or not you and the other principal box people formed an association?

A. Yes.

Q. Or had that been in existence?

A. We had the association.

Q. You had had the association prior to that time?

A. Yes.

Q. I will ask you whether or not at that time you and the association made any appeal to Wash-

(Testimony of Isadore Ginsberg.)

ington for relief on your principal items from the general price freeze? A. Yes.

Mr. Dooley: Your Honor, I will object to anything taking place for the purpose of the record, I will object to anything that took place prior to the period of the present violation.

The Court: Overruled.

The Witness: We retained Snyder & Snyder, attorneys, to represent us in Washington.

Q. (By Mr. Campbell): That is a local firm of attorneys? A. Yes, in Beverly Hills.

Q. At that time did you provide them with information and data respecting the economic structure of your industry, that is to say, the prices which you paid for your material during the various seasons of the year and the sales price which you had been in the custom of obtaining? [167]

A. Yes, we did.

Q. I will ask you if subsequent thereto you received this order L-117, which is the defendants' Exhibit A? A. Yes, we did.

Q. Did you thereafter follow out the provisions of order L-117, together with the ceiling prices which had theretofore been frozen on items not covered by order L-117? A. Yes.

Q. Did you thereafter and until the end of the price stabilization program to the best of your ability conform your sales prices to those set forth under order L-117, and in respect to items which are not included therein but which were included

(Testimony of Isadore Ginsberg.)

under the general freeze, did you conform your prices to those ceiling prices?

A. Yes, we did.

Q. Now, as a matter of fact, in your industry and during the operation of order L-117, and even after April 29, 1952, when ceiling price regulation 142 was issued, did you always sell at the full ceiling price?

A. Will you state that question again?

Q. After OPS came into being, did you always sell at the ceiling price or did you occasionally sell below the ceiling price?

A. After OPS came in, did I always sell for ceiling price? [168]

Q. For the full ceiling price?

A. Well, no, because there are times when the market might not warrant ceiling price and we would sell for less.

Q. In other words, you did not then set a flat price, full ceiling price for your products, did you?

A. No, because supply and demand, sometimes the supply was too great and our price would automatically drop down.

Q. Now, Mr. Ginsberg, I believe you have been identified as being a member of the committee from the box association which met with the various OPS officials after you people had learned of CPR 142, which is Government's Exhibit 1 here?

A. I was.

Q. Prior to the time that this regulation was issued, had you ever been consulted by anyone from

(Testimony of Isadore Ginsberg.)

the OPS by way of their economic advisors or economists or accountants, or any other official of the OPS with relation to the ceiling prices set forth in 142, either of dealers, yourself, or retailers from whom you were purchasing containers?

A. Never was consulted.

Mr. Dooley: The plaintiff objects for the purpose of the record to this or any other information pertaining to this subject of validity of the regulation on the ground that it is irrelevant, immaterial and has no bearing on any issue before the court.

The Court: Overruled. [169]

Q. (By Mr. Campbell): In connection with your status, not only as a box dealer yourself, but as an official and a member of this committee of the association, did you attempt to ascertain—just answer this yes or no—did you attempt to ascertain whether the OPS officials prior to promulgation of this 142 had consulted with any other of the dealers in the box industry? A. Yes.

Q. You did attempt to so ascertain?

A. Yes.

Q. Did you ascertain whether or not they had consulted with those in the box industry?

A. When you ask me the question, did I ascertain, you are asking me whether I discovered or whether they had contacted any of the dealers?

Q. Correct.

A. I say they had not contacted them prior to the regulation.

(Testimony of Isadore Ginsberg.)

Q. Prior to the regulation?

A. Prior to regulation 142. I checked with all the dealers and I found out that none of them had been contacted, including myself.

Q. In that connection, did you find anyone whom they had contacted?

A. I didn't find anybody that they had. I hadn't spoken [170] to anybody that they had.

Q. Prior to the promulgation of ceiling price regulation 142, how much did your concern customarily receive for the sanding of lugs?

A. Prior to 142?

Q. Yes.

A. A minimum of 5 to 6 cents per box.

Q. How long had that been the minimum?

A. That had been the minimum to my knowledge since 1946.

Q. Since 1946. After 142 came into being and you were a member of this committee, did you attend various meetings with the OPS officials and other members of the committee relative to 142?

A. Yes, I did.

Q. When did you first hear of 142, what was your first knowledge of it?

A. I think that Mr. Dix from the Dix Box told me about it.

Q. Mr. Dix, who was on the stand yesterday?

A. Yes, one of the members of our committee.

Q. That is the first information that you had that there was such an order?

A. That's right.

(Testimony of Isadore Ginsberg.)

Q. How soon after that, to the best of your recollection, [171] did you meet with officials of the OPS?

A. It was, oh, a few days after at the most.

Q. Did you meet with them, did you attend, upon hearing about this new arrangement, a meeting with the OPS officials as soon as they could meet with you?

A. That was the general idea.

Q. That is what you did?

A. Yes, we met with them.

Q. And you attempted to have that meeting as quickly as possible? A. That's right.

Q. Prior to your first meeting with them, had you actually seen one of these orders 142, either in the printed form or any other form?

A. No, I haven't.

Mr. Dooley: I object to the leading question. I believe counsel can phrase the question so that the witness can relate the story of the meeting.

The Court: The question is, had he ever seen it. He can say yes or no. I don't know how it is leading. I will overrule the objection. Has he ever seen the regulation? How is he going to ask him if he doesn't say that?

Mr. Dooley: He can state, your Honor, when did regulation 142 come to your attention, or bring it up some other way. [172]

The Court: Objection overruled.

Q. (By Mr. Campbell): When is the first time

(Testimony of Isadore Ginsberg.)

you actually saw a copy of this regulation 142 either in the printed form or in any other form?

A. At the first meeting we had with our committee at the OPS office on Sixth Street.

Q. Have you any way of fixing that date?

A. Well, it would be some time in May.

Q. Of 1952? A. Yes.

Q. Who was present on that occasion, to the best of your recollection?

A. Benjamin Dix, from Dix Box, and Harry Sobelman from the Acme Crate Company, and, naturally, myself, and I think that Sam Ohanesian from the Standard Crate Company was there.

Q. Mr. Magnuson of Star Box?

A. Yes, and Mr. Magnuson of Star Box and Crate.

Q. Those were from the box industry?

A. From the box industry.

Q. Who do you recall as being there representing OPS?

A. A Mr. Wilson, who was, I think, at that time the head of the OPS office or that particular branch, and Mr. Hameetman, and then——

Q. Do you know his position?

A. Pardon? [173]

Q. Do you know Mr. Hameetman's position?

A. Well, I found out after I come up there that he was supposed to be the OPS investigator to go out and check on prices, buying and selling prices for our industry, but I had never seen him until that date.

(Testimony of Isadore Ginsberg.)

Q. Was it represented to you he had anything to do with this 142?

A. Yes. They told me he was the man who had gone out and got the information for that.

Mr. Dooley: Object and move to strike that as hearsay.

The Court: It may go out.

Mr. Campbell: Prior to ruling on that, your Honor, may I ask a further question?

The Court: He said, "They told me." That is hearsay. Yes, you can ask another question.

Q. (By Mr. Campbell): Who told you that?

A. Mr. Wilson introduced us.

Q. To Mr. Hameetman?

A. To Mr. Hameetman.

Q. That was said in Mr. Hameetman's presence?

A. Yes.

Q. Did he deny that he held that office or had that function? A. No.

The Court: I will change my ruling. I will deny the [174] motion.

Q. (By Mr. Campbell): Who else was present at that time, if you recall?

A. Mr. Murray.

Q. Mr. Murray is the attorney who appeared here yesterday? A. Yes.

Q. Was he there at the start of the meeting?

A. I think he came in just about the start of the meeting.

Q. Will you proceed and relate what occurred there on that occasion, Mr. Ginsberg, giving us the

(Testimony of Isadore Ginsberg.)

words and who spoke them, if you can recall them; if not, give us the substance of what was said on that occasion.

A. Well, we came up there naturally——

Q. Let me ask you this preliminarily. It was a friendly meeting? A. Yes, very friendly.

Q. All the men there with you were on a friendly basis?

A. Frankly, they tried to make us feel very much at ease and we never felt we had anything to worry about. They acted very sympathetic, and we——

Q. Let's get what they said.

A. We came up and presented our case and showed them where we could not stay in business operating under the price [175] schedule they had set up whereby they would allow our source of supply a higher price and had decreased our selling price, and we brought out the fact that the labor cost had gone up in the meantime.

Q. What did you tell them in regard to your labor cost?

A. We had two labor increases. The previous May 15 we had signed a contract for a raise and we were already in negotiations with Local 630 of the Teamsters Union for another contract.

The Court: May I ask a question? Wasn't the ceiling on wages in effect at this time?

The Witness: There was no ceiling on wages. We argued that with the Teamsters Union and they told us there was no ceiling on wages as far as

(Testimony of Isadore Ginsberg.)

they were concerned, that if we didn't give the raise they were going to close us up, they wouldn't let a truck come into any of the dealers, and the Teamsters Union is pretty tough, as you know.

Q. (By Mr. Campbell): Anyway, you had granted a raise and you called that to the attention of the OPS officials at that time? A. Yes.

Q. Proceed with what you told them.

A. After we got through explaining our story, they were very sympathetic and——

Q. What did they say that led you to believe they were [176] sympathetic?

A. They told us that inasmuch as the investigation was made here in Los Angeles, and even if they had to go back to Washington to adjust the prices, that inasmuch as it would take so long to do it, that they thought they could possibly take care of it right here in our Los Angeles office and they would recommend it by sending back letters to Washington and try to hurry it up as soon as possible.

Q. What else, if anything, do you now recall was said on that occasion?

A. Well, for example, Mr. Wilson was very jovial about it. He said, "After all, we haven't got enough handcuffs to put you all in jail and I wouldn't worry about it, if I were you. We will do the best we can."

Q. Was anything said in that conversation relative to your engaging lawyers again to take up the matter in Washington?

(Testimony of Isadore Ginsberg.)

A. Well, they seemed to feel——

Q. What was said, not what they felt.

A. Well, Mr. Murray said that he didn't think it would be necessary actually for us to—he said, "It is good to have counsel, but inasmuch as the mistake was made here in the Los Angeles area, and even though they had"—the price changes generally come from Washington, D. C., that he would see to it that they would get the information back there and hurry [177] back relief on the price schedule.

The Court: Just a minute. May I ask a question? Did he use the word "mistake"? You said a mistake was made.

The Witness: He might not have used the word mistake. He might have used another word, which I cannot recall, but it was inferred there was a mistake.

The Court: The regulation had its inception here in Los Angeles. Did he tell you that the regulation had been a mistake?

The Witness: They did agree that on this information that we brought up, they agreed it was a hardship and he agreed he would send this information back revising the price schedule so that we could have relief. To my way of thinking, that inferred that there was a mistake made.

Q. (By Mr. Campbell): Let me ask you this, was there any agreement expressed at that time with respect to the representations made by the box people that you could not operate under this sched-

(Testimony of Isadore Ginsberg.)

ule as set forth in 142? Did they say anything to indicate that they recognized you could not operate under this schedule?

A. Yes, they agreed that we couldn't operate under 142.

Q. Economically, you couldn't continue to operate?

A. That's right, they did agree on that.

Q. Was anything said about how long it would take you if you went through the regular channels of sending attorneys [178] to Washington?

A. Well, they said it would take several months.

Q. As I understand, it was indicated to you in words that the local office, having originated this order, could correct the order?

Mr. Dooley: I object again to the leading tone of the question.

The Court: I think the objection is good. Sustained.

Q. (By Mr. Campbell): There was a whole series of meetings, was there not? A. Yes.

Q. Over how long a time did they extend, Mr. Ginsberg?

A. Oh, a couple, three months, I imagine.

Q. I will ask you if as a result of these meetings it is your definite understanding that the local office would secure the setting aside of this 142 and restoration of the situation as it then existed——

Mr. Dooley: Object to the leading question.

(Testimony of Isadore Ginsberg.)

Q. (By Mr. Campbell): —prior to that time? I am going into the state of mind.

The Court: What difference does it make? Is the question of wilfulness an issue in this case?

Mr. Campbell: It is a question.

The Court: The question of wilfulness may be an issue in this case relative to treble damages?

Mr. Campbell: Yes.

The Court: I might say to you I don't anticipate, if I find for the plaintiff, giving treble damages, so you don't have to go into the state of mind of this witness. I will sustain the objection.

Mr. Campbell: I will withdraw the question.

Q. After your initial meeting with the officers of the Office of Price Stabilization and after you had been advised of this CPR 142, did you continue to operate your business under the prices set forth in Order L-117 with respect to items set forth in it and did you continue to operate your business as to other items with respect to the frozen prices which had come into being with the operation of the Act originally? A. Yes, we did.

Q. To your knowledge, was that generally done throughout the industry? A. Yes.

Q. Will you state specifically whether or not the officials of the Office of Price Stabilization were advised at all times as to what was being done?

A. Yes, they were.

Q. Were you instructed by anyone to desist from that practice? A. No, I was not.

Q. Did you hear any of the others so instructed?

(Testimony of Isadore Ginsberg.)

A. No, they weren't.

Q. Did you at all times, both before and after April 29, 1952, maintain full and complete records at your place of business as to the containers bought by you from others for resale and the containers sold by you, both as to the type of container and the prices sold for and the services as were rendered on those containers? A. Yes, I did.

Q. Were those records open and available at all times to any proper official of the Office of Price Stabilization? A. They were.

Q. Were your records at all times not only made available to them, but subsequent to April 29, 1952, and subsequent to your first meeting, was any examination made of your records?

A. Subsequent to our first meeting?

Q. Yes. A. No.

Q. At those meetings, will you state whether or not you offered those records to the Office of Price Stabilization? A. Yes, I did.

Q. Were any other records offered?

A. Yes. All the dealers brought up our records. I had my accountant draw up profit and loss statements and cost sheets and income tax reports and everything to show the differential [181 between our margin of profit under CPR 142 and what it was previous to that.

Q. And what you had been making as net profit prior? A. That's right.

Q. What did you do with those records after

(Testimony of Isadore Ginsberg.)

you took them up to the OPS? Did you leave them there?

A. They didn't keep them. We took them back again.

Q. Did they examine them at the time you took them up there?

A. They sort of glanced at them.

Q. Did they make transcripts of any kind or copies? A. Yes, they did.

Q. After you had made those records available to them, did you have any further conversation with them as to whether or not you could operate under 142?

A. Did I ask them whether I could operate under 142?

Q. No. Did you have any further conversations with them concerning the subject of whether you could operate at a profit rather than a loss under 142?

A. We told them we couldn't operate at a profit, we would have to take a loss.

Q. Did any official of OPS ever indicate to you his opinion was to the contrary, you could operate without a loss under 142?

A. No. They all agreed we were right. [182]

Mr. Campbell: You may cross examine.

Mr. Dooley: Before cross examination, your Honor, I make a motion to strike all of the testimony of the witness prior to the period of the violation, May 5, 1952, through January 31, 1953, on

(Testimony of Isadore Ginsberg.)

the ground that it is irrelevant and immaterial to any issue before this court.

I also move to strike all the testimony of the witness pertaining to the raise in wages, also pertaining to inability to make profit, or whether the members of OPS consulted with them prior to CPR 142, on the ground it is immaterial here to any issue before the court and irrelevant.

The Court Denied. Mr. Dooley, you have agreed that order No. L-117 was a valid order and it appears that defendants operated under order L-117 for about a year and a half.

Mr. Dooley: Yes, your Honor.

The Court: Then ceiling price regulation 142 was issued. Is there anything in 142 to revoke in any way No. L-117?

Mr. Dooley: Yes, your Honor.

The Court: Can you point it out to me?

Mr. Dooley: Yes, your Honor, I will. Section 1(c) of ceiling price regulation 142 states as follows:

“This regulation supersedes the general ceiling price regulation with respect to the transactions covered.”

The Court: I know, but it was the general ceiling price [183] regulation that was the freeze order, the original freeze order, was it not?

Mr. Dooley: Yes, your Honor. I would like to further quote in that connection from Order L-117.

The Court: From what?

Mr. Dooley: 117, the first paragraph of order 117.

(Testimony of Isadore Ginsberg.)

The Court: All right.

Mr. Dooley: "Reference is made to your application, filed through Snyder & Snyder, attorneys-at-law, of Beverly Hills, California, dated June 7, 1951, in which you request that the Director of Price Stabilization establish ceiling prices for your fruit and vegetable containers under the provisions of Section 7 of the General Ceiling Price Regulation. This regulation authorizes the Director of Price Stabilization to set ceiling prices for a commodity or service when such price cannot be determined under any other section."

So it is clear from the order itself it was established under subsection 7 of the general ceiling price regulation.

The Court: That may be perfectly true, but when you supersede the general ceiling price regulation, do you supersede anything that was done under that regulation?

Mr. Dooley: It would seem so. Something was issued under the general ceiling price regulation and the general ceiling price regulation itself has been superseded. I don't see [184] how any orders made under the general ceiling price regulation could continue in effect.

The Court: You may proceed with your cross examination.

Mr. Dooley: Your Honor, did you make a ruling on the motion?

The Court: I deny your motion.

(Testimony of Isadore Ginsberg.)

Cross Examination

Q. (By Mr. Dooley): Mr. Ginsberg, you stated that no OPS officials checked with any members of the industry. How did you ascertain that?

Mr. Campbell: He said that he could find——

The Witness: I spoke to them. We have an association and we are friendly. We talk to each other. We do business with each other. I call them up and they call me up. That was the only way I could find out, was by speaking to them.

Q. (By Mr. Dooley): Did you ask each one?

A. Yes, I did.

Q. Why were you interested in that at that time?

A. It was relevant to our business. I had to know.

Q. So you asked each member of the industry in Los Angeles County?

A. As far as I know, I did.

The Court: Have you any evidence, Mr. Dooley, to the contrary? [185] If you have some evidence to the contrary, produce your evidence.

Mr. Dooley: I was seeking to show the improbability of the witness' testimony, without having any direct evidence to the contrary.

The Court: Do you know of any instance just prior to regulation 142 that they went around and checked the industry?

Mr. Dooley: No, your Honor. I don't know of any instance.

Q. Coming back to the meeting or meetings that

(Testimony of Isadore Ginsberg.)

you said were held between certain members of the committee of the box and crate industry and officials of the Office of Price Stabilization, did you hear Mr. Murray tell you that ceiling price regulation 142 was in effect and was the law?

A. Did I hear him saying it was in effect and was the law?

Q. Yes.

A. I don't recall him saying that.

Q. Mr. Murray was present at that meeting?

A. Yes, he was.

Q. After this meeting was held, did anyone tell you that ceiling price regulation 142 had been changed?

A. After this meeting did anyone tell me that ceiling price 142 was changed?

Q. Yes. [186]

A. You mean OPS official?

Q. OPS official or anyone.

A. No, I don't recall hearing anything like that.

Q. After this meeting did you go back down to the OPS offices? A. After which meeting?

Q. You said there were several meetings. After the last of the meetings.

Mr. Campbell: He couldn't have gone back after the last of the meetings.

The Court: I don't understand you.

Q. (By Mr. Dooley): Did you go down to the OPS office after the last of the meetings between the committee and the OPS officials?

A. No, I didn't.

(Testimony of Isadore Ginsberg.)

Q. You stated that the meetings were over a period of two or three months, is that correct?

A. I think so.

Q. After the three months you didn't check on the matter any further? A. No, I didn't.

Q. You stated that the officials of OPS were advised at all times that you were complying with order L-117 after the passage of CPR 142. How were they advised?

A. Our records were open and at the time we had our meetings [187] with them, we told them that they would always be available to them.

Q. But you didn't actually advise any of them, did you?

A. Yes, we did, at the time we were there.

Q. What did you advise them?

A. Well, after we had our meetings, you mean?

Q. First, during which meeting and what did you advise them?

A. Well, we just went along on the basis of what they told us that we could do. They said that the order had originated in the Los Angeles office and that they were going to correct it and we could go along on the same basis and they would try to give us our relief as soon as possible.

Q. You stated that the OPS officials were advised at all times that you were continuing to price under order L-117.

A. I did not call them up every day and tell them. They knew when we left there that we were going along on the basis of L-117 and they were

(Testimony of Isadore Ginsberg.)

going to give us relief as soon as they possibly could.

Q. How did they know? Did you tell them?

A. Yes.

Q. Directly, or in what way did you tell them?

A. By speaking to them.

Q. Did you say, "Mr. Wilson, I am going to sell my commodities under order L-117"? [188]

A. We told them we couldn't operate under ceiling price regulation 142. We told them we couldn't operate under ceiling price regulation 142 because we would have to lose money and we didn't have the same mark-up we had previously.

They agreed that it was true and that they were going to try to get us relief and that we would have to go along on the basis of L-117.

Q. So you told them that you couldn't operate, rather than you wouldn't operate, isn't that correct?

A. We told them it would be impossible to operate under 142.

The Court: They never at any time gave you a letter or written memorandum that it would be possible for you to operate under L-117?

The Witness: We had a letter on 117.

The Court: But after the meeting you had down at the office of OPS relative to regulation 142, did anybody ever write you a letter, give you a memorandum of any kind that you could still continue to operate under 117?

(Testimony of Isadore Ginsberg.)

The Witness: No, but they gave it to us verbally.

The Court: But not in writing?

The Witness: Not in writing.

Mr. Campbell: Your Honor, we don't contend in behalf of any of these defendants that there was a written memorandum.

The Court: I assumed there wasn't any writing, but I [189] wanted to be sure.

Mr. Campbell: I am applying it to all the other cases as well.

Q. (By Mr. Dooley): You stated in your direct examination that Mr. Murray told you any change would have to go to Washington.

A. I will explain myself again. Mr. Murray, when he listened to all the facts and figures that we gave him, he agreed that the thing was not equitable, that our price schedule gave us a smaller mark-up than what we had had previously, and we had already assumed two raises in wages. He came out with this statement, he says, "It is true that these things are changed back in Washington, D. C., but inasmuch as these prices were investigated here in Los Angeles and originated here," he said, "I am going to see to it that we get information back to Washington, D. C., to recommend," and he stated this very emphatically, "recommend that we have these prices changed so that you can get relief in the very near future."

Q. Did you ever get any information that anything came from Washington, D. C.?

(Testimony of Isadore Ginsberg.)

A. No, we didn't.

Mr. Dooley: No further questions.

The Court: After he told you that he was going to recommend that the prices be changed, what was said then about continuing to operate under order L-117? [190]

The Witness: Well, he didn't actually say anything either way. He didn't commit himself either way.

The Court: He didn't tell you to continue under L-117?

The Witness: But he also didn't say that we couldn't continue under L-117.

The Court: Just kept still?

The Witness: Just kept still, he didn't say a word.

The Court: When in doubt that is a pretty good thing to do, to keep still.

Mr. Dooley: No further questions.

Mr. Campbell: That's all.

The Court: You may step down.

(Witness excused.)

Mr. Campbell: May we have the morning recess at this time?

The Court: Yes. It is 11:00 o'clock. We will now recess until 10 minutes after 11:00.

(Recess.)

Mr. Campbell: If the court please, I have a witness on his way here and I would like to interrupt the next witness when he arrives to put him on.

The Court: All right.

Mr. Campbell: Mr. Ohanesian. [191]

SAMUEL OHANESIAN

called as a witness herein by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Samuel Ohanesian.

The Clerk: Will you spell your last name?

The Witness: O-h-a-n-e-s-i-a-n.

Direct Examination

Q. (By Mr. Campbell): What is your business or occupation? A. Box dealer.

Q. What is the name of your concern?

A. Standard Crate Company.

Q. Is that a partnership or fictitious name?

A. Partnership.

Q. Who are your partners?

A. My brother.

Q. How long have you been in the box business?

A. We are the first box business, my father started it.

Q. You are the original box business?

A. Yes.

The Court: How many years ago was that?

The Witness: Approximately 30 or 32 years ago. [192]

The Court: Can you keep your voice up a little bit?

The Witness: Yes, sir.

Q. (By Mr. Campbell): Your concern is one

(Testimony of Samuel Ohanesian.)

of the largest concerns in the used fruit and vegetable container business, is it not?

A. Yes, sir.

Q. You have heard the statements made by the previous two witnesses that in their opinion the 14 dealers here represent approximately 90 to 95 per cent of the business. Is that in conformance with your estimate? A. Yes, sir.

Q. Mr. Ohanesian, without going into the history of the industry, were you a member of the committee of box companies which called upon the officials of the Office of Price Stabilization with respect to purported ceiling price regulation 142?

A. Yes, sir.

Q. When was the first time that you ever saw a printed or otherwise copy of CPR 142?

A. When Mr. Ginsberg called me and told me about it after the first meeting. I was not present at the time.

Q. You were not present at the first meeting at the OPS? A. That's right.

Q. Prior to the first meeting, which was early in May by the testimony, you had never heard of this 142? [193] A. That's right.

Q. When was the first time you ever saw a copy of this 142?

A. I got one through the mails.

Q. Shortly after that, would you say?

A. Well, a number of weeks after that.

Q. What are your duties in connection with the Standard Crate Company?

(Testimony of Samuel Ohanesian.)

A. Well, I am the general manager.

Q. Do you supervise both the buying of boxes and the selling of boxes? A. Most of it.

Q. Prior to the first time you ever saw this 142, were you ever consulted by any official of OPS relative to the prices set out? A. No, sir.

Q. Did you ever have any discussions, orally or otherwise, with any official of OPS relative to the proposed ceiling prices of dealers and retailers?

A. No, sir.

Q. Would your testimony be the same as that of Mr. Ginsberg with relation to the close knowledge which those who are in the used vegetable and fruit container business have of others engaged in the same business in this area?

A. Yes, sir. [194]

Q. Have you had discussions with others in the same line of business, that is to say, dealers relative to whether or not officials of the Office of Price Stabilization consulted with them relative to these proposed ceiling prices? A. Yes, sir.

Q. In any instance, did you receive information that they had consulted with them?

A. Yes, sir.

Mr. Dooley: I object to that as calling for hearsay, your Honor.

The Court: I think it is hearsay. The objection is sustained. May I ask a question while we are interrupted?

You say you got a copy of the price regulation through the mail. It is dated April 29, 1952. How

(Testimony of Samuel Ohanesian.)

long after April 29, 1952, did you get that through the mail, approximately?

The Witness: Well, it was several weeks after.

The Court: Several weeks after?

The Witness: In fact, that 142 was mailed out to the commission houses before we got it.

The Court: Did you have any notice of any kind at all relative to regulation 142 until you received it?

The Witness: We got notice when Mr. Ginsberg and the committee went up the first time, but they did not get No. 142. [195]

The Court: You didn't go with them?

The Witness: No.

The Court: Did you have any notice from anybody that 142 was in effect?

The Witness: No, I did not.

The Court: Regulation went into effect on April 29, 1952. This action was filed May 1, 1953. During that period did anybody tell you you were going to be prosecuted because you were charging above the prices set forth in regulation 142?

The Witness: No, sir, not until the time they came over and checked the books.

The Court: When did they come over and check the books?

The Witness: I forget the exact date. I think the first time they called me was in July or August.

The Court: July or August when? 1952?

The Witness: 1952, yes.

The Court: When they checked the books, did

(Testimony of Samuel Ohanesian.)

they tell you a complaint was going to be filed because you had been selling over ceiling prices?

The Witness: Yes.

The Court: They told you that, did they?

The Witness: I presume they did.

The Court: Don't you know?

The Witness: No. Yes, I think they did tell us that.

The Court: Then even though they told you that, you continued [196] to operate?

The Witness: We continued to go to the OPS.

The Court: You still operated under L-117, didn't you?

The Witness: That's right.

Mr. Campbell: I would like to fix the date of that, if I can.

Mr. Dooley: I object, your Honor. The witness has testified as to the date.

The Court: Overruled.

Q. (By Mr. Campbell): Mr. Ohanesian, tell me this. At the time you were told that there was going to be some prosecution against you, was that before or after the full Office of Price Stabilization went out?

A. Before.

Q. How long before?

A. Oh, maybe a month.

Q. Maybe a month?

A. Maybe a month or so.

Q. How long was it prior to the time you were served with this complaint?

A. Approximately a month, a month and a half.

(Testimony of Samuel Ohanesian.)

Q. Before you were served with this complaint?

A. That's right.

The Court: May I ask a question?

Mr. Campbell: Certainly. [197]

The Court: When was the Office of Price Stabilization discontinued here in Los Angeles, what was the cut-off date?

Mr. Campbell: January 1953.

Mr. Dooley. April 3, 1953. I am not positive of the date. I believe it was in April, though, your Honor.

Mr. Campbell: You mean the cut-off of the office or the termination of the program?

The Court: I mean the cut-off of the office, when the office was closed here.

Mr. Campbell: I think that was April 1953. The price ceilings here concerned went out on January 31, 1953. Is that correct?

Mr. Dooley: It was on January 18, 1953, that the ceilings went off, but the office stayed on until April 1953.

Mr. Campbell: I am trying to place the date of this conversation.

The Court: I want to know something now, if I can find out. The complaint was filed May 1, 1953. That was after the office was closed. Who was the instigator of this complaint? The U. S. Attorney didn't go out and look for business. Somebody had to come in. Who was the party who was the real instigator? This matter wasn't presented to the grand jury in any way, was it?

(Testimony of Samuel Ohanesian.)

Mr. Dooley: No, your Honor. This is a civil matter. The OPS enforcement section, Mr. Harrington, I believe, was in [198] charge of the enforcement section, had investigated these various firms, had checked the books and records and made certain computations which showed they were in excess of CPR 142 and they were referred to this office. As far as I can ascertain, that is the history of it.

The Court: They were referred to the office before January 1953?

Mr. Campbell: Maybe we can stipulate. My understanding is the investigation did not take place until January 1953.

The Court: You mean the investigation took place after the ceilings had gone off?

Mr. Campbell: As I understand it. The record, as indicated by the complaint, your Honor, runs up to January 31, 1953.

Mr. Dooley: In one of the cases, I think all of the cases were referred at the same time, it was referred by letter from the Office of Price Stabilization dated March 23, 1953. It seems to have been received in our office April 15, 1953. It may have gone through other channels.

Mr. Campbell: I think we can probably agree that the investigation did not commence until after January 31. The books and records of the dealers up to January 31, 1953, were called for and examined by the OPS, at which time, subsequently,

(Testimony of Samuel Ohanesian.)

the recommendation for instigation of this suit was made. [199]

Mr. Dooley: But from the witness' testimony, there is nothing to indicate he may not have been told prior to that.

The Court: I am not interested in the testimony of this witness. I was interested in the facts as to whether this was referred to the office, and evidently it was referred to your office for prosecution after the ceiling prices had gone off.

Mr. Dooley: Yes, your Honor.

The Court: You just told me the ceilings went off January 31, 1953, and you didn't get the referral until April, so evidently it was after. Evidently, from counsel's statement, the investigation was not made until after the ceiling went off.

Mr. Dooley: I will have to do more checking, your Honor.

Mr. Campbell: Maybe we could pass that. Could I interrupt with the witness I referred to, your Honor.

The Court: Yes. Go ahead. Excuse me for breaking in.

(Witness withdrawn.) [200]

DON F. CLARK

called as a witness herein by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Don F. Clark.

Direct Examination

Q. (By Mr. Campbell): Mr. Clark, what is your business or occupation?

A. I am an attorney.

Q. Where are you presently officing?

A. 639 South Spring Street. I am in private practice at this time.

Q. During the years 1952 and 1953, what was your occupation?

A. I was an enforcement attorney for the Office of Price Stabilization, specifically in charge of the division known as industrial materials, manufacturing goods and industrial materials.

Q. In what location did you occupy that position, Mr. Clark?

A. In Los Angeles at 108 West Sixth Street, the district office in Los Angeles.

Q. Your immediate superior was James Harrington, the [201] enforcement attorney?

A. Yes, he was the district enforcement director.

Q. In connection with your assignment there, did matters concerning dealers in the used agricultural and fruit box business come to your attention?

A. It did.

(Testimony of Don F. Clark.)

Q. As an enforcement attorney?

A. As an enforcement attorney.

Q. Do you recall approximately when the matter was first brought to your attention, Mr. Clark?

A. Yes. It was brought to my attention by a letter from Washington, not a specific complaint locally, I would say the latter part of December in 1952.

Q. The latter part of December, or could it have been the first part of January 1953?

A. It could have been. It was right around the Christmas period.

Q. The end of 1952 or the beginning of 1953?

A. Right in there, yes.

Q. That was the first time the box industry had been called to your attention officially?

A. Yes, sir.

Q. Incidentally, so that we can establish a date, do you recall the date that the OPS ceilings were lifted?

A. Yes, sir. They were lifted by a series of orders. [202] There was no one order that lifted ceilings on everything.

Q. I know. They came along gradually?

A. Yes. There was one order that lifted large bulk consumer goods, and the other specific items were then lifted, and there was an overall blanket order lifting the remaining. The series of orders came in January 1953.

Q. Do you recall the specific date that would apply with relation to this industry?

(Testimony of Don F. Clark.)

A. I would say the last two weeks of January 1953.

Q. You would not find fault with the date of January 18, 1953, which has been suggested?

A. That would be very close.

Q. When did the Office of Price Stabilization actually close, if you know?

A. April 15, 1953.

Q. Did you remain there during the last days of the agency?

A. Yes. We remained, some enforcement officers remained after that date for a short time to wind up our pending work, but the office closed officially April 15.

Q. At the time that you first had your attention directed to the box industry in December 1952 or January 1953, had any investigation of possible over-ceiling sales in that industry been completed, to your knowledge?

A. Not by the enforcement division. I believe there had [203] been some economic studies made.

Q. Only economic studies made?

A. That's right.

Q. Thereafter, either at your direction or the direction of someone else, was an investigation commenced on that subject?

A. Yes, sir, at my direction an overall investigation was commenced.

Q. So that the investigation as to whether or not these people were in violation of regulation 142 did not commence until after your attention had

(Testimony of Don F. Clark.)

been directed to the industry by this letter of late December 1952 or early January 1953?

A. That is correct.

The Court: When did this overall investigation commence?

The Witness: Your Honor, it commenced, to the best of my recollection, I would say in the early part of January 1953. I can say this, that as to the actual date it commenced, I am not sure, but as to the date that the investigation was enlarged and pushed forward, it was later than that. We had preliminary inquiries, but we did not go in to actually investigate at all until later on in January.

Q. (By Mr. Campbell): While you were still in office there, Mr. Clark, and before the actual closing of the office, you had made available to you certain reports of investigating officers of OPS who conducted an investigation pursuant to your [204] request or your direction, which in turn was, pursuant to its charge, brought to your attention by this letter of early January 1953, is that correct?

A. That is correct.

Q. During that period of time, it is a fact, is it not, that you also held meetings of various representatives of this industry for the purpose of determining the equities of their situation?

A. Yes, we did.

Q. Those began at some time after January 1, 1953, and continued, not only during the time that all of the ceilings were lifted, but even subsequent to that date?

A. That is correct.

(Testimony of Don F. Clark.)

Q. As a result of these reports which you received from your investigative agencies and as a result of the meetings which you had with representatives of the industry, I will ask you if you made a written report, particularly on the matter of the equities existing on the part of the box industry, to Washington. A. Yes, I did.

Q. Do you recall the date of that, roughly?

A. I made several reports. I would say that March of 1953 was the date of my most comprehensive report on the subject.

Q. March 1953? [205]

A. It might have been the latter part of February, but it was February or March.

Q. At that time then, that was prior to any time any action had been instituted against these people?

A. Yes.

Q. Do you yourself have a copy of that communication, Mr. Clark?

A. No. I looked through the records I did retain. I don't have a copy. But I remember specifically the correspondence.

Mr. Campbell: This is the document I referred to yesterday as having made a request of the United States Attorney that he produce, and I believe he stated that although he had made inquiry from Washington, he had not received a copy of the document. Is that correct?

Mr. Dooley: There has been no formal request of the United States Attorney. You mentioned that there was a letter written and asked me if I would

(Testimony of Don F. Clark.)

see if I could get hold of it and I told you I would try. Of course, I will object to this as being immaterial and irrelevant to any issue before this court, but I have no objection if the court deems it material, to you introducing secondary evidence.

The Court: If it is an objection on the ground it is immaterial, the objection is overruled.

Q. (By Mr. Campbell): Will you, to the best of your recollection, [206] Mr. Clark, state your findings as set forth in that letter as to the equities of the situation in the box industry?

A. Yes, sir. With the court's permission, I would have to give a little background, if that is satisfactory.

Mr. Campbell: We have no jury here.

The Court: Go ahead.

The Witness: We had investigated a case just before we were completing these box cases in which on a technicality the subject of the investigation was in our interpretation of the specific regulation guilty of a violation. It was extremely technical. The subject cooperated to the extent of bringing this violation to our attention by means of a letter asking for an interpretation, what he should do.

Q. (By Mr. Campbell): That was with relation to some other industry, some other case?

A. Yes. The price division, the person in the price division who had obtained the letter, turned it over to enforcement and stated from this letter there were probably some violations. It was turned over to our office, the case was opened, and we had

(Testimony of Don F. Clark.)

no other authority but to proceed and make an investigation, which we did, and upon the conclusion of the investigation it was apparent from the facts that there was technically a violation, there were certain factors, such as the subject had brought this to our attention, that there was [207] no intent on his part, that nobody had been hurt, because it was a subsidiary corporation the sale was involved to, and these facts we considered sufficient to close the matter.

Q. And you did close the preliminary matter in your office?

A. No. We had no authority to close it that way. So I drafted a letter with Mr. Harrington's approval and signature asking authority to close the case on the basis from the equities involved and the extreme technicality of the violation we did not feel justice would be obtained by further prosecuting the matter.

We received an answer stating that we were an administrative agency, that Congress passed the laws and set up the yardsticks, that all we did was investigate and apply the facts, and if there was a violation, technical or otherwise, we had no discretion to close the matter and we should forward it to the United States Attorney's office with the facts and the equities could then be considered either by the United States Attorney's office or a court. This letter had come into the office just before this time.

When we completed our investigation in this

(Testimony of Don F. Clark.)

case, we found ourselves in the same position. We held a meeting with the industry.

Q. You say you found yourself in the same position. You were in the same frame of mind, were you, that the [208] equities in this situation were in favor of the defendants?

A. Yes, and if we had authority, we would have closed the case, but we had no authority.

Q. By reason of previous instruction?

A. That's right.

The Court: You say that was a memorandum from Washington?

The Witness: No, this was a letter, a letter from the Director of Enforcement, Lambert O'Malley, to Mr. Harrington.

The Court: Saying that the equities could be considered by the District Attorney's office or by the court?

The Witness: Yes, but not by the administrative agency.

The Court: Are you sure he said the equities could be considered by the United States Attorney or the court?

The Witness: It was pointed out that in negotiations by the United States Attorney's office, the Department of Justice would consider, in arriving at a compromise or any other conclusion, matters such as the probability of successful prosecution, et cetera, which we could not consider administratively.

(Testimony of Don F. Clark.)

The Court: Mr. Dooley, do you have a copy of that letter?

Mr. Dooley: I don't recall a copy of that letter in our file. However, what he states is true with respect to a compromise. The Department of Justice considers the financial status of the parties.

The Court: What I am interested in here is the statement of this witness that the court can consider the equities. Now, [209] thus far my opinion of your position has been that I couldn't consider the equities, if I found there was a violation, I was going to have to render judgment in accordance with the prayer of the complaint.

Mr. Dooley: At least single damages, your Honor, and I have a case from the Ninth Circuit Court of Appeals arising on that question where the court can consider with respect to giving treble damages, the case of Fleming vs. Hanson, 162 F.(2d) 164.

The Court: You don't have to read it. I will read the case.

Mr. Dooley: It is the last paragraph in the opinion, your Honor, that mentions that very thing.

The Court: I thought if you had that letter we could see what was actually said.

Mr. Campbell: We have the unfortunate circumstance of some files being in Washington.

The Court: You may proceed.

The Witness: As a result, the local office was required to refer the case to the United States Attorney's office, and the set procedure provided for a referral memorandum which was a form mem-

(Testimony of Don F. Clark.)

orandum and in which this previous correspondence would not be proper or wouldn't be incorporated.

Q. (By Mr. Campbell): At that time you wrote a letter to Washington, did you not, setting your views forth with relation [210] to the proposed prosecution of these suits? A. Yes, sir.

Q. That is the letter which I was trying to get to. Will you relate what you stated to Washington as to the equities in this situation?

A. In the letter I referred to the report of the investigation. I might point out at this time that at all times the investigation was under my control and I had the investigators look for certain points and for certain persons. I wanted to know more about the background of the economic effect of order 142 compared to the previous letter order, I think 117 was the number, but I am not sure.

Q. 117, yes.

A. The investigators interviewed the audit division and the economic division, who had at the request of the price division supposedly gathered certain figures, and made a comparison to determine whether or not this order 142 was equitable, whether there should be some recommended revision.

Q. I interrupt to call to your attention Defendants' Exhibit D, which purports to contain an economic analysis dated February 26, 1953, and ask you if that was one of the matters which you had before you at that time, if you recall.

A. Yes. This investigation and this memoran-

(Testimony of Don F. Clark.)

dum was made at my request as part of our investigation.

Q. In other words, this Exhibit D was prepared as a [211] result of your request that the investigation be made? A. That's right.

Q. Now you may proceed.

A. There were two investigators assigned to this matter and they were working full time on it. The investigation disclosed——

Q. Pardon me, Mr. Clark. I don't think we can proceed into that. The question was directed at your recommendations with respect to the equities of the situation.

A. As a result of the investigations, it was my opinion and it was so stated in my recommendation that order 142 had increased to the retailer the price of used wooden agricultural crates in such a manner that a super market or the ordinary source of supply to a reconditioner would be able to charge a higher price for the unfinished used boxes; that prices on certain of these containers had been increased for the reconditioner after he had reconditioned and resold them, but other boxes had not been increased.

That as a result, from a strictly theoretical standpoint, without regard to the actual number and type of containers sold in the Los Angeles market, that theoretically a reconditioner could maintain his average mark-up as he had before, but in applying the actual type of boxes and the number to the reconditioners here, there was a very bad economic

(Testimony of Don F. Clark.)

squeeze, and that we came to the conclusion that a reconditioner [212] could not follow the order and stay in business.

Q. In other words, it was your conclusion, after the examination of the matters obtained by the investigation and economic survey, that the effect of 142, if enforced, would be to cause the local dealers to operate at an actual loss rather than at a profit, is that correct? A. That is correct.

Q. That was a statment which you forwarded to Washington upon the completion of your investigation which was originated in January 1953?

A. We did state from a strictly impartial standpoint, and we pointed out the other facts, that there was an avenue of correction for the box people, such as petitions for relief, and that these steps had not been taken, but we did point out that we felt that they believed such action was being taken by the Office of Price Stabilization.

Q. It was your conclusion that these people honestly believed such steps were taken?

A. We felt they honestly believed so, but they did not take the technical legal procedure that was set forth in the Act.

Q. The indicated legal procedure would have been to make a written appeal to Washington?

A. That is correct.

Q. But you also found, on the other hand, that these [213] people had come to the conclusion that the local office was taking the necessary steps.

A. That is correct, as a result of the meetings.

(Testimony of Don F. Clark.)

The Court: In this letter, did you make any recommendation to the Department?

The Witness: We made the statement in the concluding paragraph that in view of the fact that the office was closing and these were the last remaining cases in a pending status, and in view of the letter we had received with regard to the other matters, stating that the administrative office had no jurisdiction to consider equities, the matters were being referred to the United States Attorney's office.

Q. (By Mr. Campbell): You cited this previous instruction that you had locally no prerogative in the matter?

A. Yes. That was all done in one letter, or a series of two or three, I don't recall, but it was all done in a short period of time.

Mr. Campbell: You may cross examine.

Mr. Dooley: I have no cross examination. I would like, however, to make a motion to strike all his testimony as being irrelevant and immaterial to any issues before this court.

The Court: Motion denied.

Mr. Campbell: Your Honor, may Mr. Clark be excused?

The Court: Have you any further use for Mr. Clark?

Mr. Dooley: None. [214]

The Court: You may be excused.

The Witness: Thank you.

(Witness excused.)

SAMUEL OHANESIAN

having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Campbell): Mr. Ohanesian, you heard the testimony of Mr. Clark as to when this investigation took place, that is in January 1953, or commencing January 1953. Does that refresh your recollection as to when you were first told you would be charged with being in violation of 142?

A. Yes.

Q. What is your recollection when you were first advised you were going to be sued by the government?

Mr. Dooley: I object on the ground the question has been asked and answered.

The Court: Overruled.

The Witness: Well, after they checked my books, they told me I was in violation.

Q. (By Mr. Campbell): That was January 1953? A. About that time. [215]

Q. Now, Mr. Ohanesian, in the first place, when you first learned of 142, when was that?

Mr. Dooley: I object to that.

The Court: He testified he got it through the mail. Sustained.

Q. (By Mr. Campbell): Did you, Mr. Ohanesian, at all times keep full and complete records in your place of business as to where you purchased boxes and to whom you sold them and the prices at which you sold them?

(Testimony of Samuel Ohanesian.)

A. Yes, sir.

Q. Were they open and available for inspection by any authorized government agency or agent?

A. Yes, sir.

Q. Did you at all times attempt to fully live up to the provisions of order L-117 with respect to items set forth in order L-117?

A. Yes, sir.

Q. Did you keep in close touch with other members of the industry in that regard?

A. Yes, sir.

Q. Aside from the first meeting, you attended the other meetings with officers of the OPS with the committee?

A. Yes, sir.

Q. Do you have any recollection different from that testified by the witnesses who preceded you, Mr. Dix and Mr. [216] Ginsberg, concerning what took place at that time?

A. Yes, sir.

Q. What do you recall in addition to or different than they recalled?

A. Every time we had a meeting with the OPS officials, they always told us that they were going out of office and that they didn't know what was going to happen, they might not be there Monday, and they agreed it was all right to use L-117.

Q. That was your definite understanding?

A. Yes.

Q. Based on that, you continued to use L-117?

A. In fact, they asked us if we were satisfied with L-117.

Q. Who asked you that, do you remember?

(Testimony of Samuel Ohanesian.)

A. I don't remember the names, but one of the officials. We agreed on it.

Q. You were satisfied with L-117?

A. Yes.

Q. Other than that, is your recollection the same as theirs? A. Yes.

Mr. Campbell: You may cross examine.

Mr. Dooley: I object to that question. I don't want to make the testimony repetitious.

Mr. Campbell: I will change the form. [217]

Q. Would your testimony as to other matters be the same as theirs? A. Yes.

Mr. Dooley: That is a leading question.

The Court: Mr. Dooley, if we have to bring every one of these defendants in and put him on the stand, we will be here for two or three days. I don't think it is necessary. The objection is overruled.

Mr. Campbell: I was going to ask, after this witness is through, if we could stipulate the others would testify to the same effect.

The Court: Let's wait until we are through with this witness.

Mr. Campbell: You may cross examine.

Mr. Dooley: I would like the witnesses to take the stand, but to ask this witness a blanket question, is your testimony the same as the others——

The Court: Substantially the same. Have you got any cross examination?

Mr. Dooley: A little bit, your Honor.

The Court: Mr. Dooley, it's nearly 12:00 o'clock.

(Testimony of Samuel Ohanesian.)

Mr. Dooley: It won't be over two or three questions.

The Court: All right. [218]

Cross Examination

Q. (By Mr. Dooley): Mr. Ohanesian, you were present when Mr. Murray testified, were you not?

A. Yes, sir.

Q. Was Mr. Murray at this meeting?

A. Yes, sir.

Q. Did you hear Mr. Murray state CPR 142 at that meeting was in full force and effect?

A. I did not.

Q. Did anyone ever tell you CPR 142 had been changed? A. No.

Mr. Dooley: Your Honor, I have a few questions in addition, if you want to call the recess, and I can finish afterwards.

The Court: No. Go ahead, if it is only going to take a few minutes.

Mr. Dooley: It won't be long.

Q. You stated somebody at the meeting told you to go ahead. Do you know who it was that told you to go ahead under order L-117, do you know who he was?

A. It was a very friendly meeting. There was four or five members of the OPS there. I don't recall which member of the OPS said that.

Q. Do you know what position he held with the OPS? [219]

A. I think he was a U. S. Attorney.

(Testimony of Samuel Ohanesian.)

Mr. Dooley: No further questions.

Mr. Campbell: That's all.

The Court: You may step down.

(Witness excused.)

The Court: How many more witnesses do you anticipate calling, or do you want to get a stipulation?

Mr. Campbell: Yes. Can it be stipulated the others if called, the members of the committee, would testify substantially the same as these three witnesses?

Mr. Dooley: The plaintiff will so stipulate.

Mr. Campbell: I would like to go over my notes and then we will rest.

The Court: Do you have any other testimony?

Mr. Dooley: Yes, your Honor, I have an additional witness.

The Court: How long will he take?

Mr. Dooley: Well, he shouldn't take any more than 30 minutes even on cross examination.

The Court: We will recess until 1:30 this afternoon.

Mr. Dooley: All of the defendants who testified were present at the meeting. I would like to call one defendant who was not present.

The Court: You can call anybody you want to, Mr. Dooley, [220] on your redirect, if you want. We will now recess until 1:30 this afternoon.

(Thereupon, an adjournment was taken until 1:30 p.m., of the same date.) [221]

The Court: You may proceed.

Mr. Campbell: The defendants will rest, your Honor.

Mr. Dooley: The plaintiff calls as a witness Mr. Arlington Wilson.

ARLINGTON J. WILSON

called as a witness herein by and on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Arlington J. Wilson.

Direct Examination

Q. (By Mr. Dooley): Mr. Wilson, on or about May 1952, what was your occupation?

A. I was acting branch chief of the industrial and manufacturing goods section of the Office of Price Stabilization, Los Angeles.

Mr. Campbell: Pardon me, Mr. Wilson. Can you keep your voice up a little bit? It is difficult to hear. Would you repeat your title?

The Witness: Acting branch chief of the industrial and [222] manufacturing goods division of the Office of Price Stabilization, Los Angeles. In that respect I would like to say I got an Irish promotion yesterday from Mr. Dix, when he put me as head of the OPA. That is not correct.

Q. (By Mr. Dooley): How long had you served in that capacity, Mr. Wilson?

A. From February 14, 1951, about, to January 31, 1953.

Q. On or about that date, were you present at

(Testimony of Arlington J. Wilson.)

a meeting or meetings with representatives of the Los Angeles Box and Crate Dealers Association?

A. Yes.

Q. Referring to the first of these meetings, who else, if anyone, was present?

A. Well, there was a meeting far ahead of that one which was held in the Produce Exchange down in the market somewhere, I don't know who was responsible for calling the meeting, whether we did or whether the producers did or whether the box people did. That was late in February 1951 or some time in March. That was really the first meeting.

Q. Do you recall when the ceiling price regulation 142 came out? A. Yes.

Q. The first meeting after that regulation——

The Court: Just a minute. Let me go back and find out something. The regulation which is known as order No. L-117 [223] is dated June 28, 1951. I understood you to say that there had been a meeting before this regulation came out?

The Witness: That's right. Shortly after the general price ceiling regulation went into effect.

The Court: And regulation L-117 came out after that meeting?

The Witness: Yes.

Q. (By Mr. Dooley): Calling your attention to the first meeting after ceiling price regulation 142 was promulgated, who else, if anyone, was present at that meeting?

A. Jack Hameetman for one, and usually at

(Testimony of Arlington J. Wilson.)

those meetings that I officiated at, I always made it a point in a big group meeting to call in an attorney, and it is very possible he was there. He may have come in after the meeting got started, but I am pretty sure he was there, Mr. Murray.

Q. You stated you officiated at the meeting, is that correct? A. That's right.

Q. The representatives of the Los Angeles box and crate companies, do you know what representatives were present?

A. Well, I recognize quite a few of them. I can't call them by name, but I see quite a few of them out here.

Q. Will you point out the men to the court, please?

A. I know Mr. Dix, and this other gentleman——

Q. The witness is identifying Mr. Dix. [224]

Mr. Campbell: Will the men who were present stand up? Do you recognize these gentlemen?

The Witness: Yes.

The Court: For the record, will you give us their names?

Mr. Campbell: For the purpose of the record, those he has identified are Mr. Ginsberg, Mr. Dix, Mr. Ohanesian, Mr. Sobelman, Mr. Magnuson.

Q. (By Mr. Dooley): What was the subject of discussion at this meeting, Mr. Wilson?

A. Well, thinking back, I think, as a matter of fact I know it was the problem of the freeze, the

(Testimony of Arlington J. Wilson.)

original freeze on their prices of boxes during that period December 20 to January 19, 1951.

Q. Was there any discussion concerning ceiling price regulation 142?

A. That would be at the second meeting.

Q. I am referring to the meeting that took place after the ceiling price regulation 142 came into effect.

A. Yes. They came down and more or less protested, they had a problem that they wanted to discuss with us, and we welcomed it.

Q. You were here yesterday and you heard Mr. Dix state that you made a statement somewhat to this effect, that there are not enough handcuffs to put them all in jail. Will you state whether or not you made that statement? [225]

A. It is very likely I did. Perhaps I should qualify that by saying this, that I had established a policy as far as that branch agency was concerned, that we were there to help the businessmen in their different problems and the interpretation of the regulations and to be of whatever help we could be. We always made it known we didn't have anything special to give except consideration to their problem and an interpretation of the regulations, and to be helpful. The chances are I would say that there are not enough handcuffs around, and in addition to that, I perhaps also told them, as I have told others, we just don't have horns down there, that we were a father confessor of the

(Testimony of Arlington J. Wilson.)

people and we wanted to know what their problems were and we wanted to be helpful to them. That was the program all the way through. But, on the other hand, there was a statement made yesterday, something to the effect——

Mr. Campbell: Pardon me. I am going to object to this.

The Court: You can't volunteer any information. You can only answer questions.

The Witness: All right.

Q. (By Mr. Dooley): You were here and heard the testimony of Mr. Dix yesterday, were you not?

A. Yes.

Q. Are there any respects in which that testimony is at variance with your view of the events at that meeting?

Mr. Campbell: Pardon me. I am going to object to the [226] question in that form as not competent.

The Court: Overruled. You can answer yes or no only.

The Witness: Will you repeat the question?

The Court: Read the question.

(Question read.)

Mr. Campbell: It is calling for a conclusion, if the court please, and opinion. It is not a statement of fact.

The Court: He can answer yes or no. If he thinks the testimony is substantially correct, he can say "Yes," and if not, he can say so.

(Testimony of Arlington J. Wilson.)

The Witness: Substantially correct. There is only one point I would like to clear up, if I may.

The Court: What point is that?

The Witness: That point is that Mr. Dix said, "Don't worry." What I want to say, and perhaps I did say it, maybe, I can't tell, but I think there is a big difference between "Don't worry," and "Just go out and do as you please regardless of the regulation."

Mr. Campbell: I ask that last be stricken.

The Court: That may be stricken as a conclusion.

Q. (By Mr. Dooley): Will you state whether or not you told any of the members of the Los Angeles Box and Crate Association to continue pricing under order No. L-117?

A. There is only one answer to that and that is no, definitely. [227]

The Court: None of these defendants have testified they were told to disregard the regulation. They testified that they said they were going to proceed under L-117 and the OPS did not tell them to proceed under L-117, didn't tell them not to proceed under 117. In other words, they kept quiet.

Mr. Dooley: Well, I believe this last witness testified somebody advised them, and it was not very clear——

Mr. Campbell: If the court please, we have the testimony of Mr. Murray, produced by the government, who said the same thing. If this is an attempt to impeach the testimony of Mr. Murray, I am going

(Testimony of Arlington J. Wilson.)

to object to it on the ground it is not proper impeachment.

The Court: Objection overruled. The answer may stand. But, however, that is in the record. If you want to change it, you are changing it at your own peril.

Mr. Dooley: No, your Honor. I was just considering this last witness that took the stand this morning, that I wanted to get clarified, your Honor.

The Court: My recollection of that testimony is that he didn't say anybody told him to disregard the regulation.

Mr. Dooley: I believe he said he was advised—I asked him specifically who advised him and I believe he said he thought it was a United States Attorney.

Mr. Campbell: You are not referring to Mr. Dix' testimony? [228]

Mr. Dooley: No. The last witness this morning.

The Court: That is Ohanesian. I did not get it that way. Maybe he said that. If he did, I didn't get it.

Mr. Campbell: He said one of the OPS people there. He didn't say Mr. Wilson. He was asked who it was and he said he wasn't sure.

The Court: He didn't testify anybody told him to disregard the regulation 142.

Mr. Campbell: No, but they told him he could go ahead under 117.

The Court: But this question was relative to dis-

(Testimony of Arlington J. Wilson.)

regarding price regulation 142, and none of the defendants have testified they were told to disregard that regulation.

Mr. Dooley: I believe the question was to continue under order 117, your Honor. I am not sure.

The Court: Well, go ahead.

Mr. Dooley: The answer has been given.

The Court: The answer may stand.

Q. (By Mr. Dooley): You were here yesterday and heard Mr. Murray's testimony, is that true?

A. Yes.

Q. Will you state whether or not Mr. Murray stated to the members of the industry that CPR 142 was the law, or words to that effect?

A. Yes. [229]

Mr. Campbell: I will object to the question in that form. What Mr. Murray testified to is in the record.

Q. (By Mr. Dooley): Will you state whether the testimony as given by Mr. Murray substantially represents what occurred at that meeting?

A. Yes.

Mr. Campbell: I am going to object to that on the ground it calls for a conclusion of the witness.

The Court: Overruled. You followed the same procedure yourself. It was objected to by the United States Attorney and it was overruled.

Mr. Campbell: No, I asked the question, would your testimony be substantially the same. He is asked to find fault with Mr. Murray's testimony.

(Testimony of Arlington J. Wilson.)

The Court: Objection overruled. The answer is "Yes."

Mr. Campbell: I must learn the virtue of silence, your Honor.

Q. (By Mr. Dooley): Mr. Murray, during that meeting——

The Court: This is not Mr. Murray.

Q. (By Mr. Dooley): Mr. Wilson, during that meeting did you promise any of the representatives of the industry to have CPR 142 amended?

A. I wouldn't say I promised that it would be amended. I promised, perhaps, may have promised that we would make some attempt and present the facts or get the facts through the different [230] channels and have a research made of the whole deal, and then we had no authority, we had no delegation in this district office, nor did the regional office in San Francisco have delegation to amend the regulation. It all had to be prepared and passed through San Francisco to Washington and the final answer would have to come from them. I think that about covers it.

Q. You said there was more than one meeting. At the other meetings, what was the subject of discussion after ceiling price regulation 142 came into effect?

A. Well, as I recall, there was a renewal of the previous discussions and a presentation of, maybe, some questions on the part of the economists and the accounting section, the accountants, and perhaps a report to the group on what action had already

(Testimony of Arlington J. Wilson.)

been taken to date. That would be the procedure.

Mr. Dooley: No further questions. You may cross examine.

Cross Examination

Q. (By Mr. Campbell): Mr. Wilson, I take it from the date that you gave that you were active in the local Office of Price Stabilization from the time of its inception until the office closed?

A. Well, that needs an explanation. I will make it as short as I can. I was perhaps the first one that was brought [231] into the office of industrial materials and manufactured goods. In the early stages I handled all the various commodities myself, busy bird dog, gasoline and woods and everything else. We were short. It was some time later, maybe towards the latter part of the mid summer, I guess about August, that a chief had been appointed, but during his stay there, he was absent a great part of the time, and finally was relieved. During his absence and in the interim periods I served as acting chief. In other words, I was in charge and then out of charge, one day in and the next day or next week out.

Q. At any rate, you remained in the local office until it was closed? A. That's right.

Q. And January 31, 1953, was the closing date of the office? A. That's right.

Q. Isn't it a fact that the ceiling with respect to this particular industry, used wooden agricultural container industry, had actually been lifted

(Testimony of Arlington J. Wilson.)

in a general lifting of approximately January 19, 1953, if you recall that?

A. I don't recall that.

Q. You don't recall anything to the contrary?

A. No. At that time we had at the close of the office some 250 regulations in the one branch alone, so it is pretty difficult. [232]

Q. You couldn't keep your finger on each one of them?

A. That's right, without refreshing my recollection from records.

Q. You referred first to a previous meeting prior to 142 which was held back in February 1951 down in the produce market. Isn't it a fact that the box dealers, these dealers, were not represented at that meeting, but that was a meeting with the wholesalers down there?

A. There was a large group of them. I am not in position to say, but I know that the box people were there.

Q. Do you remember specifically any of these people being there? A. Yes.

Q. Who do you recall?

The Court: That was a meeting prior to L-117?

The Witness: Yes, way back.

The Court: Well, I don't think it is material as far as this is concerned.

Mr. Campbell: Then I will withdraw the question, your Honor.

The Court: There was a meeting and there was discussion.

(Testimony of Arlington J. Wilson.)

Q. (By Mr. Campbell): Now, Mr. Wilson, did you yourself have anything to do with the formulation of this regulation 142?

A. Only by direction. I perhaps put the motion in operation [233] to proceed and make the investigation in the field.

Q. That led up to this 142?

A. Yes, sir.

Q. Did you yourself prior to the promulgation ever see this 142 that you recall at this time?

A. I saw it in its original form as it was submitted to the regional office for transmittal to Washington. Whether the wording is the same or whether the figures and things are the same, I am not in position to know.

Q. Who was the actual draftsman of the figures set forth in here?

A. There was a combination there, the business analyst, Jack Hameetman, and the economist and the accounting section.

Q. Do you recall any of the other individuals besides Hameetman? A. Sir?

Q. Do you recall any of the other individuals besides Hameetman?

A. There was a girl named Lavine. I have forgotten her first name. She was an economist. Then there was either the head of the accounting section or his assistant. I don't remember.

Q. Were you present at any time prior to April 29, 1952, when the prices as set forth in this regu-

(Testimony of Arlington J. Wilson.)

lation 142 were discussed with any of the box dealers? [234]

A. Do you mean at a meeting in my office or something like that?

Q. Yes, in your office or in their office, a group of them, or individually?

A. I think I would like to answer that by saying if they were there, I presided at the meeting.

The Court: Well, they said they weren't there.

Q. (By Mr. Campbell): They said they were never interviewed about 142. Were you present at any time when they were?

A. I will abide by that. That's all right.

Q. You have no contrary recollection?

A. That's right.

Q. Do you recall at these meetings after the promulgation of 142 if any of these box dealers in these meetings asked if they should engage attorneys to take up the matter of amendment or change of this 142, and their being told by you or someone in that meeting that while an attorney was always helpful, it was not necessary inasmuch as the local office would take the necessary steps to obtain relief, or to that effect?

A. That is substantially correct. I at no time would say do not employ counsel or outside help regardless. I mean there is only one answer to that. I would never say, "Don't do that." [235]

Q. But you do recall substantially the conversation which I related, that the local office would take the steps necessary to get them the relief?

(Testimony of Arlington J. Wilson.)

A. That would be the procedure, yes. We would be glad to help them. However I expressed myself, we were always rather friendly to this group and tried to assist them with their weighty problem.

Q. It is a fact that these people came to you and very frankly, and you very frankly with them discussed the problem in the industry, isn't that right?

A. That's right.

Q. You and the other officers expressed your sympathy with the situation in which they found themselves, did you not?

A. Yes, to a large degree, yes.

Q. It was generally recognized at these meeting, was it not, that these people could not economically operate, at least by their representations and subject, you say, to your further investigation, under the prices as set forth in 142?

A. There was evidence of that, and for that reason we agreed to go into the subject and see what we could do to help them out.

Q. Isn't it a fact that the meetings continued from time to time right up until practically the expiration of the OPS?

A. Yes, I think that is correct. [236]

Q. You think that is correct?

A. Yes. What intervals, I wouldn't be able to tell.

Q. Prior to January 1953 when the investigation leading to these particular complaints was originated, according to the testimony of the law enforcement attorney, were you present at any

(Testimony of Arlington J. Wilson.)

time at which you or any other OPS official advised these people that if they continued to operate under 117 and did not operate under 142, that the government would bring any proceedings against them of any kind?

A. No, I don't recall anything like that. That may have been from another division, but I don't recall anything like that.

Q. You never made such a statement?

A. No.

Q. Or no such statement was made in your presence? A. No.

Q. It is a fact, isn't it, Mr. Wilson, that these people told you and you knew at the time of all of these meetings that these people were continuing to operate under 117 and the general price ceiling, rather than 142?

A. I don't know as I fully understand that question.

Mr. Dooley: I would like to ask the court if counsel would make his question simpler.

Mr. Campbell: I will break it up.

Q. These people at all times in the course of these meetings [237] told you that they were continuing to operate under 117?

A. No, I don't think I ever heard them say they were continuing to operate under 117, and if they had, I would tell them very quickly that they would be very likely to be in violation.

Q. Did you ever tell them that?

(Testimony of Arlington J. Wilson.)

A. Not to my recollection. I don't think I ever heard that they were operating under 117.

Q. Didn't they from time to time—do you recall that from time to time they said to you, "Come down and go over our records. We can show you we can't operate under 142"? Do you recall that? A. Yes, I will agree.

Q. You recall that they brought records into your office for examination of those concerned with that type examination, including their income tax returns, do you recall that?

A. No, that I do not remember.

Q. You don't remember that that did not occur, you just have no recollection on the subject?

A. That's right.

Mr. Campbell: I think that's all.

Mr. Dooley: You may step down, unless the court has something.

The Court: No, I have no questions.

(Witness excused.) [238]

The Court: Call your next witness.

Mr. Dooley: I would like to call Mr. Abe, one of the defendants, under Rule 43(b).

WALTER S. ABE

one of the defendants herein, called as a witness by and on behalf of the plaintiff under Rule 43(b), having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Walter S. Abe.

Mr. Campbell: Is this rebuttal testimony?

Mr. Dooley: Yes, concerning the meeting and the subsequent events.

Direct Examination

Q. (By Mr. Dooley): Mr. Abe, you are with the A. B. C. Crate Company, are you not?

A. That's right.

Q. And you are the owner of this company, are you not?

A. That's right.

Q. Where is this company located?

A. 612 South Santa Fe or 610.

Q. In Los Angeles, California?

A. That's right. [239]

Q. You have heard the testimony of various witnesses concerning the meeting with OPS officials. You weren't present at those meetings, were you?

A. No.

Q. Did you ever learn what went on at those meetings?

A. Yes, through my neighbor, Acme Crate. His name is Harry Sobelman. He give me the information what is going on.

Q. He gave you the information?

A. That's right.

(Testimony of Walter S. Abe.)

Q. Did you ever go down to the OPS office personally? A. No.

Q. You relied upon what the individual from the Acme Crate told you?

A. Yes, whatever is going on, I will ask him and he tell me what is going on.

Q. Did you take any steps to find out whether CPR 142 was amended or not?

Mr. Campbell: I object, if the court please. This is not proper rebuttal testimony.

The Court: Overruled. You may answer the question.

The Witness: What was it?

The Court: Read the question.

(Question read.)

The Witness: CPR 142 mean the second ceiling price issued? [240]

The Court: Will you read the answer?

(Answer read.)

Mr. Campbell: Do you understand the question, Mr. Abe, that he asked you?

The Witness: Well, he asked me about CPR 142. What is that CPR 142? Is that the second price issued to us?

Q. (By Mr. Dooley): I will ask this question. What did your neighbor tell you took place at the meeting?

Mr. Campbell: That is objected to as hearsay, if the court please.

The Court: Sustained.

(Testimony of Walter S. Abe.)

Q. (By Mr. Dooley): Do you know a regulation that came out around May 1952?

A. Yes, I know it came down.

Q. Was one mailed to your company?

A. Yes, I have one, first one, and then I have a second one.

Q. Did you ever take any steps to see whether that regulation was changed?

A. Why it changed?

Q. Did you ever take any steps to see whether the regulation that was mailed to you had been changed?

Mr. Campbell: I think it has been stipulated it was not changed.

The Court: There has been no evidence anybody did anything [241] except go down and talk to the OPS. They never filed any petition. They never attempted to appeal to Washington. There is no testimony here anybody did anything.

Mr. Dooley: I want to point out that the defendants will show they did or they could, he seems to be bringing that forward, and the point I am trying to bring out is he probably should have gone to ask.

The Court: Supposing he did? They had a committee that went down to ask.

Mr. Dooley: But had he taken practical precautions by relying on what his neighbor tells him?

The Court: What are you trying to establish? Treble damages?

Mr. Dooley: Not particularly on that point, but

(Testimony of Walter S. Abe.)

I want to bring out all the facts of the case for the benefit of the court.

The Court: The facts are already in. I don't think this witness can change the facts in any way. Every one of these witnesses testified they didn't do anything except go down and talk to OPS.

Mr. Dooley: No further questions.

Mr. Campbell: No questions.

The Court: You may step down.

(Witness excused.) [242]

Mr. Dooley: Will the defendants' counsel stipulate all the other persons who were absent from the meetings will testify substantially as Mr. Abe?

The Court: That is, they made no attempt to go down and find out whether the regulation had been changed?

Mr. Campbell: Other than what their committee had done or what they were advised by their committee. I think it is agreed these are all members—the stipulation covers the fact that these are all members of an association and they sent a committee down there and they discussed the matter with the committee members afterwards. Their testimony would be all the same in regard to that.

Mr. Dooley: In rebuttal the plaintiff would ask the court to take judicial notice of price procedural regulation No. 1 and revision 2 found in 17 Federal Register 377.

The Court: Is that relevant to the way the regulation can be changed?

Mr. Dooley: Yes, your Honor.

The Court: All right. I will take judicial knowledge of it.

Mr. Dooley: The plaintiff has nothing further, your Honor.

The Court: The plaintiff rests?

Mr. Dooley: The plaintiff rests.

Mr. Campbell: Defendants rest. [243]

(Discussion between court and counsel.)

The Court: Well, I am satisfied all the equities in this case are in favor of the defendants. I am satisfied regulation 142 is an invalid regulation, that the defendants are entitled to rely upon L-117. Judgment will be for the defendants in all these actions. You will prepare findings of fact and conclusions of law?

Mr. Campbell: Yes, your Honor. [244]

[Endorsed]: Filed July 19, 1954.

[Endorsed]: No. 14432. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Dix Box Co., a partnership, Benjamin Dix, Hyman Dix, Max Dix and Rose Mistofsky, individually and as partners in Dix Box Co., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 20, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14432

(and consolidated cases Nos. 14432-14440 and
Nos. 14442-14446)

UNITED STATES OF AMERICA, Appellant,

vs.

DIX BOX CO. and BENJAMIN DIX, doing busi-
ness as Dix Box Co., et al., Appellees.

STATEMENT OF POINTS ON APPEAL

The appellant hereby designates the following points on appeal in the above entitled matters:

1. The District Court was without jurisdiction to declare Ceiling Price Regulation No. 142 void and of no force and effect.

2. The District Court erred in declaring Ceiling Price Regulation No. 142 void and of no force and effect for failure of the Office of Price Stabilization to comply with the provisions of 50 U.S.C. App. Sec. 2104.

3. The District Court erred in finding that the conduct of the officials of the Los Angeles Office of the Office of Price Stabilization estopped the President and those to whom he had delegated authority from enforcing Ceiling Price Regulation No. 142.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

/s/ JAMES R. DOOLEY,

Attorneys for Appellant

[Endorsed]: Filed September 15, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

DESIGNATION OF RECORD TO BE PRINTED

Pursuant to Stipulation and Order for Printing
of Record, Submission of Briefs, and Argument,
heretofore entered into by the respective parties,
relative to the above entitled appeals, appellant
hereby designates the following record to be printed
in the appeal of United States of America, Appel-
lant, vs. Dix Box Co., et al., Appellees, No. 14432
only:

1. Docket entries;
2. Complaint for Damages;
3. Answer;
4. Request for Admission Under Rule 36;
5. Answer to Request for Admission Under Rule
36;
6. Stipulation As to Remaining Issues;
7. Findings of Fact and Conclusions of Law;
8. Judgment;

9. Notice of Appeal;
10. Statement of Points on Appeal;
11. Designation of Record to be Printed;
12. Plaintiff's Exhibit 1;
13. Defendant's Exhibit A.

* * * * *

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

/s/ JAMES R. DOOLEY,

Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 15, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

STIPULATION AND ORDER FOR PRINTING
OF RECORD, SUBMISSION OF BRIEFS,
AND ARGUMENT

Whereas, the judgment of the Court below in all of the above captioned appeals were based upon one consolidated trial, and;

Whereas, the record in each of the above captioned appeals is sufficiently identical so that a final determination of one appeal would be controlling as to the remainder of the above captioned appeals;

It Is Hereby Stipulated, subject to approval of Court, that the record as designated by the respective parties be printed only in the appeal of United States of America, Appellant, vs. Dix Box Co., et al., Appellees, No. 14432.

It Is Further Stipulated, subject to approval of Court, that all of the above captioned appeals may be consolidated for briefing and argument.

Dated: September 14, 1954.

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,

Assistant U. S. Attorney

/s/ JAMES R. DOOLEY,

Attorneys for Appellant

LILLIE & BRYANT and

WALTER M. CAMPBELL, JR.,

/s/ By WALTER M. CAMPBELL, JR.,

Attorneys for Appellees

So Ordered: This 15th day of September, 1954.

/s/ WILLIAM DENMAN,

Chief Judge

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

Judges, U. S. Court of Appeals,
Ninth Circuit

[Endorsed]: Filed September 17, 1954. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

COUNTER DESIGNATION OF RECORD
TO BE PRINTED

Come now the Appellees and hereby request the designation of the entire typewritten transcript of the testimony taken at the consolidated trial herein before the United States District Court, in lieu of those portions of the typewritten transcript designated by Appellant as number "14" of its Designation of Record.

Dated: September 16, 1954.

LILLIE & BRYANT, and
WALTER M. CAMPBELL, JR.,
/s/ By WALTER M. CAMPBELL, JR.,
Attorneys for Appellees

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 21, 1954. Paul P. O'Brien, Clerk.

No. 14,432

(and Consolidated Cases Nos. 14,432-14,440 and
Nos. 14,442-~~and~~ 14,446)

No. 14,441

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

DIX BOX COMPANY AND BENJAMIN DIX, DOING BUSINESS
AS DIX BOX COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

HELEN CARVAJAL, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

BRIEF FOR APPELLANT

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FILED

JAN 19 1955

PAUL P. O'BRIEN,

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14,432

(and Consolidated Cases Nos. 14,432-14,440 and
Nos. 14,442-~~14,444~~ 14,446)

UNITED STATES OF AMERICA, APPELLANT

v.

DIX BOX COMPANY AND BENJAMIN DIX, DOING BUSINESS
AS DIX BOX COMPANY, APPELLEE

No. 14,441

UNITED STATES OF AMERICA, APPELLANT

v.

HELEN CARVAJAL, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The United States, on May 1, 1953, instituted an action against each of the defendants here involved,¹ to recover treble the amount of overcharges which the

¹ Fifteen actions in all were instituted. The defendants in fourteen of these actions have agreed, with the consent of this Court.

defendants were alleged to have received for goods sold between May 5, 1952, and January 31, 1953, in excess of ceiling prices established by Ceiling Price Regulation 142, issued under the authority of the Defense Production Act of 1950, as amended, 50 U. S. C. App. § 2061 *et seq.* (R. Dix 3-7, R. Carvajal 3-6). Jurisdiction was invoked under Section 706(b) of the Defense Production Act, as amended, 50 U. S. C. App. § 2156(b), and on 28 U. S. C. § 1345. Judgments for the defendants were entered in all cases, save No. 14,441, on March 1, 1954 (R. Dix 24-25), and in that case on April 16, 1954 (R. Carvajal 13-14). Notices of appeal were filed by the United States on April 28, 1954 (R. Dix 25, R. Carvajal 14-15). The jurisdiction of this Court rests upon 28 U. S. C. § 1291.

STATEMENT OF THE CASE

The Government in these cases contends that the appellees, between May 5, 1952, and January 31, 1953, sold goods for prices in excess of the ceilings established by an applicable regulation of the Office of Price Stabilization and claims treble the amount of these overcharges under Section 409(c) of the Defense Production Act of 1950, 50 U. S. C. App. § 2109(c). In all of the cases except No. 14,441 (*United States v. Helen Carvajal*), the appellees stipulated that the number of sales and prices charged, as set forth by the Government, were correct (R. Dix 13-14), but contended that

that the appeals in their cases may be consolidated for briefing and argument on a single printed record (R. Dix 248). The defendant in the fifteenth case has consented with the approval of this Court to the filing of a single brief by the United States. References to the record in No. 14,432 (consolidated with thirteen other cases) will be indicated as R. Dix —, to the record in No. 14,441 as R. Carvajal —.

the regulation which they were alleged to have violated was invalid, and that, moreover, the Government was estopped from enforcing the regulation by reason of actions and representations of officials in the Los Angeles office of the Office of Price Stabilization. The District Court ruled for the appellees on both contentions. No. 14,441 was not tried together with the other cases, and no stipulation as to prices charged or goods sold was there entered.² Judgment for the appellee was entered in that case on the grounds which had obtained in the other fourteen cases, and in addition the court held that this appellee was not subject to the regulation in question by its terms.

The appellees were each engaged during the period in question and for varying lengths of time before then in purchasing, reconditioning, and then selling used agricultural containers in the Southern California area (R. Dix 18, R. Carvajal 9). Pursuant to authority vested in the President of the United States by the Defense Production Act of 1950, 64 Stat. 798, 50 U. S. C. App. 2061 *et seq.*, and by him duly delegated to the Director of Price Stabilization, ceiling prices for the appellees' sales of used agricultural containers were originally fixed at the highest prices obtained by them between December 20, 1950, and January 19, 1951, as provided by the General Ceiling Price Regulation, 16 F. R. 808 (Jan. 30, 1951), 5424 (June 8, 1951) (R. Dix 19, R. Carvajal 10). The business of the appellees was subject to sea-

² The trial court, however, found that appellee Carvajal "followed the examples of the Association" which had informed the duly authorized representatives of the Office of Price Stabilization that they would and thereafter did continue to comply with the ceiling prices as established by the said Order L-117 and the General Ceiling Price Regulation, both of which CPR No. 142 purported to supersede.

sonal variation, and this base period fell within a slack season. The appellees therefore, through attorneys, filed a protest with the Office of Price Stabilization in Washington, complaining that the prices which they had obtained during this base period did not properly reflect their business (R. Dix 19-20, R. Carvajal 10-11). In consequence, the OPS, pursuant to the General Ceiling Price Regulation, issued Order L-117 on June 28, 1951, setting revised ceiling prices for certain of the goods sold by the appellees (R. Dix 92-95).

On April 29, 1952, the OPS issued Ceiling Price Regulation No. 142 (17 F. R. 3822, R. Dix 36-38), which superseded the General Ceiling Price Regulation with respect to the transactions covered, and established new ceilings upon both the prices which the appellees might charge and the prices which the retailers who sold to them might receive. On learning of this new regulation the appellees, through five of them acting as representatives of all, met with officials of the Los Angeles office of OPS and stated to those officials that they could not continue profitably in business under this regulation. At the first meeting, which was held sometime in early May, 1952, the Los Angeles officials agreed to investigate the situation with a view to having the regulation changed. Similar meetings continued to be held until January 20, 1953, when all ceilings with respect to the appellees were lifted. The trial court has found (R. Dix 21-22, R. Carvajal 11-12) that at each of these meetings there was agreement between the representatives, both industry and OPS, that the prices established by CPR 142 resulted in lowering the margin of gross profit to the dealer to such an extent that it would require operation at a net loss and that the Los Angeles office would make the necessary investigations and recommendations to

Washington to have the regulation amended. The defendants were informed that it might be helpful but would not be necessary for them to engage attorneys (R. Dix 22).

The trial court also found that the appellees had stated to the Los Angeles officials that they would continue to operate under L-117 and the General Ceiling Price Regulation and that they did, in fact, so continue with the knowledge of the Los Angeles office (R. Dix 22, R. Carvajal 12). There was, however, conflicting testimony among the appellees as to whether they had ever been told by the OPS representatives that they might so continue. Two of the appellees who had been among the five representatives at the meetings testified that they had not been told they could continue and that they had not been told they could not (R. Dix 121, 198). One appellee, who also had attended the meetings, testified that he was told that "it was all right to use L-117" (R. Dix 221), but was unable to state who it was that had told him (R. Dix 223). It was not contested that no written permission or authority to continue under L-117 or to ignore CPR No. 142 was ever received by any appellee (R. Dix 197).

The trial judge also found that no attempt was made by the Director of Price Stabilization or his representatives to consult with any dealers in the used agricultural containers business prior to the promulgation of CPR 142 (R. Dix 20-21, R. Carvajal 11). The court found in this a failure to comply with Section 404 of the Defense Production Act, 64 Stat. 807, 50 U. S. C. App. Section 2104, and on this basis declared CPR 142 void and of no force and effect (R. Dix 23, R. Carvajal 12). He found, moreover, that the "conduct and prom-

ises, expressed and implied," of the Los Angeles representatives of OPS estopped the President of the United States and those to whom he had delegated authority from enforcing CPR 142 (R. Dix 23, R. Carvajal 13).

Appellee Carvajal, unlike the other fourteen appellees, did not, during the period in question, purchase used containers from retailers who had received them filled with fruits and vegetables. She purchased all of her containers from dealers. Because CPR 142 set prices only for dealers and for retailers, and because it defined dealers as those who purchased from retailers for resale, and because appellee Carvajal was clearly not a retailer, the trial court ordered judgment in her favor on the grounds that the regulation did not apply to her as well as on the two grounds on which judgment for the other fourteen appellees had been predicated (R. Carvajal 12-13).

QUESTIONS PRESENTED

1. Whether the court below had jurisdiction to declare void a regulation promulgated under the Defense Production Act by the Director of Price Stabilization.

2. Whether in any event such a regulation may be declared invalid because of a failure of the Director to advise and consult with the members of the industry concerned before issuing it.

3. Whether the President of the United States and those to whom he has delegated authority may be estopped by the conduct and promises of those Office of Price Stabilization officials here involved in the circumstances of this case.

4. Whether one who purchased used agricultural containers from dealers rather than from retailers, and then reconditioned and resold them, was herself a dealer subject to Ceiling Price Regulation 142.

STATUTES INVOLVED

The pertinent provisions of the Defense Production Act of 1950, 50 U. S. C. App. §§ 2061 *et seq.*, are printed in the Appendix to this brief, *infra*, pp. ~~23-27~~. *24-28*

SPECIFICATIONS OF ERROR RELIED ON

1. The District Court erred in declaring Ceiling Price Regulation 142 void.
2. The District Court erred in declaring ^{*the*} Price Regulation void because of a failure of the Director of Price Stabilization to comply with the provisions of 50 U. S. C. Appendix, Section 2104.
3. The District Court erred in holding the President and those to whom he has delegated authority estopped from enforcing the provisions of Ceiling Price Regulation 142.
4. The District Court erred in holding that the appellee in No. 14,441 was not a dealer subject to Ceiling Price Regulation 142.

ARGUMENT

I

The District Court Was Without Power to Declare CPR 142 Void and of No Force and Effect, Because Exclusive Jurisdiction to Determine the Validity of Such a Regulation Rests With the Emergency Court of Appeals and on Review Therefrom With the Supreme Court.

1. In enacting the Defense Production Act of 1950, Congress provided in language almost identical to that which it had used in the Emergency Price Control Act of 1942 that the regulation and orders issued under the Act would be subject to review as to their validity only in a special tribunal which could give experienced analysis and uniform application to the measures taken in administering the Act. Although other courts would take part in the enforcement of these regulations, the

regulations themselves could not be questioned therein. The language which Congress used was explicit (Defense Production Act, § 408(c), as amended, 50 U. S. C. App. § 2017 (c)) :

* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under this title [Title 50, App. U. S. C. §§2101-2112], * * * of the provision of any such regulation or order. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order relating to price controls, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title [said sections] * * * authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

When almost identical language appeared in the Emergency Price Control Act of 1942, 50 U. S. C. App. § 924,³ both the effectiveness and the constitutionality of the clause came under attack. The Supreme Court

³ The only difference in the provisions of the 1942 and 1950 Acts relating to exclusive jurisdiction derives from certain differences in the terminology of the Acts. The critical wording "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order * * * " appears in both statutes. For the convenience of the Court we have set out the pertinent texts of each Act in the Appendix, *infra*, pp. 23-24. 24-25

itself again and again upheld the provision and gave full force to its words, *Lockerty v. Phillips*, 319 U. S. 182; *Yakus v. United States*, 321 U. S. 414; *Bowles v. Willingham*, 321 U. S. 503, 521; *Bowles v. Case*, 327 U. S. 92, and the resulting exclusive jurisdiction of the Emergency Court of Appeals was consistently recognized by this Court. *Rosensweig v. United States*, 144 F. 2d 30, certiorari denied, 323 U. S. 764; *Bowles v. Lighthouse Oysters, Inc.*, 151 F. 2d 435; *Bowles v. Wheeler*, 152 F. 2d 34, certiorari denied, 326 U. S. 775; *Blumenthal v. United States*, 158 F. 2d 883, rehearing denied, 158 F. 2d 762, affirmed, 332 U. S. 539; *Fleming v. Dashiell*, 161 F. 2d 612; *Shyman v. Fleming*, 163 F. 2d 461, certiorari denied, 332 U. S. 844.

Under the 1942 Act, consideration of the validity of price regulations and orders was declared foreclosed in courts other than the Emergency Court of Appeals no matter how the issue might be raised, whether by an action to enjoin enforcement, *Lockerty v. Phillips*, 319 U. S. 182, or as a defense in a criminal prosecution, *Yakus v. United States*, 321 U. S. 414, *Blumenthal v. United States*, 158 F. 2d 883 (C. A. 9), rehearing denied, 158 F. 2d 762, affirmed, 332 U. S. 539, or civil action brought by the Administration for treble damages, *Bowles v. American Brewery, Inc.*, 146 F. 2d 842 (C. A. 4), *Bowles v. Wheeler*, 152 F. 2d 34 (C. A. 9), certiorari denied, 326 U. S. 775, *Superior Packing Company v. Porter*, 156 F. 2d 193 (C. A. 8) certiorari denied, 329 U. S. 788. Moreover, contentions that the Administrator had failed to comply with statutory prerequisites to the issuance of a regulation were held to be attacks upon the validity of the regulation, and thus were refused consideration in the ordinary courts. *Rosensweig v. United States*, 144 F. 2d 30 (C. A. 9), cer-

tiorari denied, 323 U. S. 764, *Bowles v. American Brewery*, 146 F. 2d 842 (C. A. 4), *Superior Packing Company v. Porter*, 156 F. 2d 193 (C. A. 8) certiorari denied, 329 U. S. 788.

The intention of Congress is no less clearly stated in the Defense Production Act that the validity of any price regulation issued under its authority should be subject only to the determination of a single court, experienced in dealing with similar orders. The almost identical language used of course evidences a conscious effort to obtain the effect of the earlier law, which had also been concerned with economic regulation in a national emergency. That effect, if ever in doubt, had now been definitively settled by the courts, and in repeating its former language Congress must be assumed to have been aware of those decisions and to have incorporated their result in the new statute. Cf. *Sessions v. Romadka*, 145 U. S. 29, 42; *United States v. Ryan*, 284 U. S. 167, 175. The small number of cases in which the issue has been raised under the Defense Production Act attests the general acceptance of the exclusive jurisdiction of the Emergency Court of Appeals, and where it has been raised the answer has been that no other court may concern itself with the validity of any price regulation. *Fast v. DiSalle*, 193 F. 2d 181, 184 (Em. C. A.); *United States v. Excel Packing Company*, 210 F. 2d 596 (C. A. 10) certiorari denied, 348 U. S. 817; *United States v. Ericson*, 102 F. Supp. 376 (D. Minn.) appeal dismissed on stipulation of parties, 205 F. 2d 420; *United States v. Walton Motors*, 114 F. Supp. 83 (D. Utah).

We submit, therefore, that the court below clearly was without authority to consider the validity of CPR 142 on any ground, and that its judgment that this

regulation was "void and of no force and effect whatsoever" was beyond its power to declare.

2. It may be noted that the court below declared CPR 142 void because it found that the regulation was "arbitrary and that no effort was made by the Office of Price Stabilization to comply with the provisions of Title 50 U.S.C. App., § 2104, in advising or consulting with the members of the Industry with respect thereto."⁴ Of course, if a failure to comply with the requirements of that section might have vitiated the regulation, that decision would nonetheless be for the Emergency Court. *Rosensweig v. United States*, 144 F. 2d 30 (C.A. 9), certiorari denied, 323 U.S. 764; *Superior Packing Company v. Porter*, 156 F. 2d 193 (C. A. 8) certiorari denied, 329 U. S. 788 (both cases involving an alleged failure of the Price Administrator to consult with the Secretary of Agriculture in connection with the imposition of price ceilings on agricultural commodities). But even the Emergency Court of Appeals has recognized that it does not have the power to invalidate a regulation because there has been no industry consultation. In *Norman-Frank, Inc., v. Arnall*, 196 F. 2d 502, dealing with such a challenge to a price regulation, that court said:

With respect to the first objection above, § 404 of the Defense Production Act [50 U.S.C. App. 2104] provides: "In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder." There was a similar provision

⁴ Except for this alleged failure to consult, there is nothing in the Findings of Fact on which to base a conclusion of arbitrariness.

in § 2(a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A. Appendix, § 901 et seq. We repeatedly held under the 1942 Act that the Administrator had broad latitude within which to exercise independent judgment as to the extent to which it was practicable to consult with members of the industry before imposing controls, and that in seeking to upset a regulation on the ground of his failure to do so a complainant shouldered the heavy burden of establishing both that the Administrator failed to consult with the industry and that it would have been practicable for him to have done so. * * * In fact, we never found occasion to set aside a regulation on this ground, even assuming the provision in question could have been deemed mandatory, and not directory merely. At any rate, the point has been rendered academic by a provision in the Defense Production Act of 1950 which had no counterpart in the Price Control Act of 1942. Section 709 of the present Act reads in part as follows:

“* * * Any rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, *but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a*

statement is inaccurate.” [Emphasis supplied by the Emergency Court of Appeals.]

CPR 142 declared that “in formulating this regulation the Director has consulted with representatives of the industry, including trade association representatives, to the extent practicable under the circumstances and has given consideration to their recommendations” (R. Dix 36). This statement satisfies the requirements of § 404, and under § 459, the regulation may not be found invalid even if this statement was proved inaccurate. Thus the court below not only invaded the exclusive jurisdiction of another court in testing the validity of the regulation, but applied in that test an improper standard.

II

The President of the United States and Those to Whom He Delegated Authority Under the Defense Production Act Were Not Estopped from Enforcing CPR 142 by the Alleged Statements and Actions of the Los Angeles Representatives of the Office of Price Stabilization.

The appellees called on the Los Angeles office of OPS in May, 1952, because they believed that under the new price regulation they could not profitably continue in business. The court below has found that the OPS representatives with whom they discussed the matter agreed with them. Without finding that the appellees were told they might properly continue under L-117 and the General Ceiling Price Regulation, the court held that the President and those to whom he delegated authority under the Act were estopped by this agreement of the Los Angeles officials and their knowledge that the appellees were following those superseded regulations.

There is nothing in the Defense Production Act or in the regulations promulgated thereunder which gave to any of the officials with whom the appellees met the power to waive the force of an official regulation. Nor is there anything which authorized the appellees to rely upon the oral statements of any Government official or to assume that in the absence of action by the Government they were permitted to proceed as though CPR 142 had never~~y~~ been issued. On the contrary, the Act and the regulations established a comprehensive scheme for obtaining the relief which the appellees sought, and they ignored those procedures at their peril.

Section 409(c) of the Act, 50 U.S.C. App. § 2109(c), which is the authority for actions to recover overcharges, provides that "the President may not institute any action under this subsection on behalf of the United States—(1) if the violation arose because the person selling the material or service acted upon and in accordance with the written advice and instructions of the President or any official authorized to act for him; * * *," and Section 407, 50 U.S.C. App. § 2107 allows for the protest of any price regulation "in accordance with regulations to be prescribed by the President." Price Procedural Regulation 1, Revised, 17 F.R. 3787, April 29, 1952, sets forth the rules governing protests, §§ 50-80, and provides two additional measures of relief for persons subject to price regulations: first, they might petition for amendment, §§ 41-45; or second, they might seek an official interpretation, §§ 91-93.⁵

⁵ CPR 142 itself refers to petitions for amendment and interpretations. In connection with the first, it refers the reader directly to Price Procedural Regulation No. 1, Revised. In connection with the second, it states that "any action taken by you in reliance upon and in conformity with a written official interpretation will con-

Protests and petitions for amendment were required to be filed with the Recording Secretary of the OPS in Washington, §§ 53(b), 42; requests for interpretation were to be filed with the District Counsel of the local District Office, § 92. Protests and petitions for amendment could be granted only by the Director, §§ 59, 76, 44; official interpretations could be made only by the Chief Counsel of OPS or one of his delegates, § 91(b). Each of the three procedures was required to be instituted in writing, §§ 54, 42, 92. The OPS action on protests and requests for interpretations was specifically required to be confirmed in writing. §§ 59(b), 77, 78, 91(b). The appellees' counsel stated explicitly before the court that "we don't contend in behalf of any of these defendants that there was a written memorandum."

The United States Government can neither be bound nor estopped by the unauthorized acts or representations of its officials. *Lee v. Munroe*, 7 Cranch 366, *Whiteside v. United States*, 93 U.S. 247, *United States v. Stewart*, 311 U.S. 60. It does not matter that the action of the official may seem to fall within the scope of his general authority, so long as his authority so to act does not exist. As the Court stated in *Whiteside v. United States* (93 U.S. at 257):

Although a private agent, acting in violation of specific instructions, yet within the scope of his

stitute action in good faith pursuant to this regulation", and again refers to the Price Procedural Regulation.

Some regulations in addition contained adjustment provisions, see §§ 21-30 but none appears in CPR 142. A petition for amendment was therefore necessary before an application for adjustment could be made, § 21. In any event, these applications too had to be made in writing, § 24, and answered in the same way, § 27.

general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment or injury of the public.

This Court itself twice declared in actions under the Emergency Price Control Act of 1942 that the Government could not be estopped by the representations or advice of OPA officials who were not empowered to interpret or amend official regulations. *Fleming v. Hanscom*, 162 F. 2d 164; *Mechanical Farm Equipment Distributors v. Porter*, 156 F. 2d 296, certiorari denied 329 U. S. 771. The appellees did not suggest in the court below, nor did that court itself indicate, any authority under which the particular OPS personnel with whom we are concerned were empowered to relieve the appellees of their obligation to follow CPR No. 142, or to waive the procedures set forth in the Price Procedural Regulation. We submit, moreover, that an examination of that regulation clearly proves the contrary.

In this connection the opinion of the Emergency Court of Appeals in *Wells Lamont Corp. v. Bowles*, 149 F. 2d 364, 367 certiorari denied, 326 U. S. 730, is apposite:

It must be presumed that complainant was advised of the procedure it was required to follow in order to obtain an official interpretation upon which it could properly rely. And, since it failed to comply with the prescribed method, it is not entitled to rely upon unofficial oral advice given by

subordinate officials in the Office of Price Administration. At first blush, this may seem harsh but, obviously, the Administrator cannot be bound by various oral interpretations which happen to be made by his hundreds, perhaps thousands, of employees, in violation of proposed regulations. He has prescribed a reasonable procedure by which persons subject to the regulations may obtain official interpretations, by which all will be bound. Complainant is not entitled to rely on an unofficial interpretation.

See also *Bowles v. Indianapolis Glove Company*, 150 F. 2d (C. A. 7), certiorari denied, 326 U. S. 794, *Schreffler v. Bowles*, 153 F. 2d 1 (C. A. 10), certiorari denied, 328 U. S. 870.

It should be noted that the instant case well illustrates one reason for the wise and constant insistence of the OPS that any request for a change in or interpretation of price regulations and any action thereon be made in writing. The state of the evidence here is such that it is not even clear that the elements of estoppel are presented, the question of authority aside. Three of the appellees testified as to what took place in the meetings with the OPS representatives. Two stated that they were neither told that they might continue under L-117 or that they might not. Only one said that such permission had been given, but he was unable to identify the person who had purported to grant it.⁶ There was, moreover, testimony by the only two OPS

⁶ Further evidence that the appellees could not reasonably have relied upon any assumption that CPR 142 was a dead letter lies in the fact that the regulation was amended in a minor part on August 21, 1952, well after these meetings had commenced. 17 F.R. 7692.

personnel called, of those who were present at the meetings, that the appellees had been specifically told that they would have to continue to obey CPR No. 142 until it was amended or revoked (R. Dix. 157, 232). While we do not deny that such a conflict of testimony can be resolved only by a trier of the facts, we do respectfully submit that had the appellees followed prescribed procedures there would be written evidence obviating any necessity of the Government in its enforcement of these regulations to rely on the vagaries of memory.

Having ignored the clear procedural requirements of the applicable regulations, and having chosen instead to rely upon the alleged statements of officials who were in any case without authority to waive or amend a price regulation, it is respectfully submitted that the appellees cannot estop those to whom Congress has granted authority from enforcing CPR 142 against them, and that their sole remedy must lie with their chance of having the regulation found invalid in the Emergency Court of Appeals.

III

Appellee in No. 14,441 Was a Dealer Subject to Ceiling Price Regulation 142

The appellee in No. 14,441, Helen Carvajal, like the appellees in the other fourteen cases, reconditioned used agricultural containers and then resold them. Unlike all the others, however, she did not purchase any of her containers directly from retailers. Rather, she purchased from dealers who had themselves bought the containers from retailers.⁷ By reason of this fact only,

⁷ Inasmuch as the court below found that the appellee purchased all her containers from persons who were dealers subject to CPR 142 and in view of the court's restricted interpretation of Section 12(b) of that regulation, that court has necessarily found that the

the court below found that this appellee was not a "dealer" within the definition set forth in Section 12(b) of CPR 142 (R. Dix 38):

Dealer: This term means a person who has facilities to store, repair, recondition, or rebuild agricultural containers and who purchases them from retailers for resale.

Since it was uncontested that appellee Carvajal was subject to the regulation only as a dealer, if at all, the court below for this reason as well as for those discussed above entered judgment for her.

It is respectfully submitted that the court below erred in confining the coverage of CPR 142 so narrowly. Section 12 of the regulation did not purport to set out inflexible definitions. It is prefaced by the statement that "this ceiling price regulation and the terms which appear in it shall be construed in the following manner, *unless otherwise clearly required by the context*: * * *" (emphasis supplied). The context of CPR 142 clearly required that one operating as did appellee Carvajal should be subject to those ceiling prices which the regulation imposed upon dealers.

The "Statement of Considerations" should certainly be looked to in determining the intended coverage of the regulation. In this instance, it declared that "this regulation establishes dollars and cents ceiling prices for used wooden agricultural containers sold in the area adjacent to the cities of Los Angeles and San Diego, California" (R. Dix 36). This sentence clearly evinced an intention that *all* sales of such containers were to be subject to the ceilings set in the regulation,

persons from whom appellee Carvajal purchased had themselves obtained the containers from retailers.

unless they were expressly excepted.⁸ Moreover, this intention was made even more clear as the Statement continued:

Approximately 630 wholesalers-growers, packers and shippers of fruits and vegetables—sell their products to retail stores, restaurants, hotels, hospitals and similar organizations in that area. All of these latter organizations for the purpose of this regulation are classified as retailers. The food products are packaged in wooden or partially wooden containers and when their contents are sold to the retailers, title to the containers is transferred to them. No definite or specific price is charged for the package. After the contents are removed, the containers, in varying states of disrepair, are sold to used-containers dealers who maintain facilities to store, repair, recondition or rebuild them. There are approximately 127 used-container dealers in the affected area.

The dealers purchase crates in small odd lots from a comparatively large number of retailers. They recondition the containers and accumulate them in their yards. They are sorted into the sizes and types commonly used by the wholesalers of fruits and vegetables and are sold to them for re-use in the handling of those products.

Because of the seasonal nature of the fruit and

⁸ Such an express exception appears in Section 12(g), defining "retailer". This term expressly excludes Army and Navy establishments. It may be noted that so important was uniformity of application considered that this exception was deleted by Amendment 1 to CPR 142, effective August 21, 1952. 17 F.R. 7692. The Statement of Considerations in this Amendment declares that "this amendment, accordingly, is issued so that all resellers in the affected area can sell the covered commodities on the same basis."

vegetable business ceiling prices under the General Ceiling Price Regulation were established during a period of fewest sales, and proved to be inadequate for a large segment of the used-container industry, particularly the used-container dealers.⁹

The General Ceiling Price Regulation level of prices created an unbalanced condition in the cost-price relationship between the three classes of persons involved in this industry in the Los Angeles and San Diego area and has impeded the free flow of containers which normally exists.

CPR 142 was thus intended to restore a balance to the cost-price relationships in this entire cycle of trade. The regulation, by establishing ceilings for the sales of both retailers and dealers, purported to fix the price of these containers at every step in the cycle at which a price was charged. To permit one who was carrying on the functions of a dealer to operate uncontrolled within this tightly regulated cycle simply because in one respect his actions were indirect rather than direct would have threatened this entire balance and have frustrated the purposes of the regulation and to that extent the purposes of the Defense Production Act.

This regulation should not be construed in a way which would destroy its purpose if a broader meaning than that found by the court below can reasonably be inferred. We submit that in this respect the regulation should be treated like a statute. The text should be interpreted "so far as the meaning of the words fairly permit so as to carry out in particular cases

⁹ It may be noted that appellee Carvajal was one of the dealers who sought relief from the General Ceiling Price Regulation in 1951, and received it in L-117 (R. Carvajal 10-11, R. Dix 95).

the generally expressed legislative policy.” *Securities Exchange Commission v. C. M. Joiner Leasing Corporation*, 320 U.S. 344, 350-51; see also *United States v. American Trucking Association*, 310 U. S. 534; *Richmond F. and P. R.R. v. Brooks*, 197 F. 2d 404, 407 (C.A. D.C.) certiorari denied, 344 U.S. 828. CPR 142 was concerned primarily with the prices at which used containers were sold. Insofar as it affected “dealers”, therefore, it was aimed at those persons who were engaged in reconditioning and reselling such containers. For its purposes it did not matter whether these were obtained directly or indirectly from the retailer. Cf. *United States v. Giles*, 300 U.S. 41 (act defining crime only in terms of direct action prohibits achieving the same result by indirect action). Section 11 of the regulation demonstrates this proposition. It declares to be a violation “any means or device which results in obtaining indirectly a higher price than is permitted by this regulation * * *.” We are not concerned with proving whether or not this appellee deliberately attempted to evade this regulation. The question here involves the regulation’s intended coverage. Certainly in Section 11 the Administrator made clear his intention that the regulation would control all the transactions which affected the balance he was attempting to set, whether carried out directly or indirectly. The appellee was thus put on notice, we submit, that her operations came under the control of this regulation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

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JANUARY, 1955.

APPENDIX

The pertinent provisions of the Defense Production Act of 1950, 64 Stat. 798, 50 U. S. C. App. §§ 2061 *et seq.*, as amended, are as follows:

Section 404, 50 U. S. C. App. § 2104:

In carrying out the provisions of this title [sections 2101-2112 of this Appendix], the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder.

Section 408(c), as amended, 50 U. S. C. App. § 2108(c):

* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any such regulation or order issued under this title [sections 2101-2112 of this Appendix], or under the Housing and Rent Act of 1947, as amended [sections 1884, 1891-1894 and 1895-1902 of this Appendix and section 1744 of Title 12]. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title [sections 2101-2112 of this Appendix], or the Housing and Rent Act of 1947, as amended [sections 1884, 1891-1894 and 1895-1902 of this Appendix and section 1744 of Title 12], authorizing the issuance of such regulations or orders, or any provision

of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

[For the convenience of the Court the comparable provision of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. App. § 924(d), is herein set out.

[Section 924(d) :

[* * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 [former section 902 of this Appendix], of any price schedule effective in accordance with the provisions of section 206 [former section 926 of this Appendix], and of any provision of any such regulation, order or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act [former sections 901-922 and 923-946 of this Appendix] authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision.]

Section 409(c), 50 U. S. C. App. § 2109:

If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or

service for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50 as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation or order in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the word "overcharge" shall mean the amount by which the consideration exceeds the applicable ceiling.

If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States within such one-year period, or compromise with the seller the liability which might be assessed against the seller in such an action. If such action is instituted, or such liability

is compromised by the President, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the President, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages, or a compromise, under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered, or prior to such compromise. The President may not institute any action under this subsection on behalf of the United States—

(1) if the violation arose because the person selling the material or service acted upon and in accordance with the written advice and instructions of the President or any official authorized to act for him ;

(2) if the violation arose out of the sale of any material or service to any agency of the Government, and such sale was made pursuant to the lowest bid made in response to an invitation for competitive bids.

Section 709, 50 U. S. C. App. § 2159:

The functions exercised under this Act [sections 2061-2166 of this Appendix] shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof [section 1002 of Title 5]. Any rule, regulation, or order, or amendment thereto, issued

under authority of this Act [sections 2061-2166 of this Appendix] shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate.

No. 14,432

(And Consolidated Cases
Nos. 14,432-14,440 and Nos. 14,442 and 14,446.)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DIX BOX COMPANY and BENJAMIN DIX, Doing Business
as DIX BOX COMPANY,

Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEES.

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FILED

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PAUL P. O'BRIEN,
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BRIEF FOR APPELLEES.

Statement of the Case.

By these actions the Government seeks to recover treble the amount of the alleged over-charges in the sale of goods in excess of ceilings established by an alleged regulation of the Office of Price Stabilization. The complaints, drawn pursuant to the provisions of Section 409(c) of the Defense Production Act of 1950, 50 U. S. C. App. Section 2109(c), alleges that the sales took place between May 5, 1952, and January 31, 1953 [R. 5].¹ Judgment was entered for each of the appellees on the grounds that

¹References to the record herein are to be printed transcription of record in No. 14432, *United States v. Dix Box Co., et al.*

(1) the purported regulation is void, and (2) the Government is estopped from enforcing it by reason of the conduct and promises of its duly authorized agents [R. 23-25].

Appellees were each dealers in used agricultural containers in Southern California during the period in question, their operation consisting in buying, reconditioning and selling used wooden agricultural containers [R. 18-19].

The industry is a small one consisting of approximately 20 to 25 dealers [R. 82]. The business done by the appellees represented about 95 per cent of that done in the area during the period in question [R. 82].

Pursuant to authority granted by the Defense Production Act of 1950, ceiling prices for the appellees' sales of used agricultural containers were originally fixed at the highest prices obtained by them between December 20, 1950, and January 19, 1951, as provided by the General Ceiling Price Regulation, 16 F. R. 808 (Jan. 30, 1951), and 5424 (June 8, 1951) [R. 19].

The use of this period as a basis for ceiling prices resulted in inequities, in that the base period fell in a season when business was slack, resulting in different ceiling prices for the individual items for practically every dealer [R. 90]. The principal items in appellees' business consisted of lugs, apple boxes, and lettuce crates [R. 97]. Of these, apple boxes were in an active market and had a competitive price but the others did not. The appellees, therefore, through attorneys, filed a protest with the Office of Price Stabilization complaining that the prices which they had obtained for key items other than apple boxes during this base period did not properly reflect their business [R. 19-20]. In consequence, the OPS issued Order L-117 on June 28, 1951 [Ex. A] setting

revised ceiling prices for certain of the goods sold by the appellees [R. 92-95].

Under date of April 29, 1952, the Office of Price Stabilization purported to issue Ceiling Price Regulation 142 setting ceiling prices so far as appellees were concerned both for their sales and for their purchases of containers for resale [R. 36-38]. Immediately upon learning of the regulation, a committee of the association of business dealers to which appellees all belonged was formed and arranged a meeting with the appropriate officials of the OPS [R. 113-114] and continued to meet with such officials periodically from the early part of May, 1952, until January 20, 1953, when the Office of Price Stabilization in Los Angeles was disbanded and all ceiling prices removed so far as appellees were concerned [R. 21]. During the course of these meetings, it was the consensus of opinion of both the representatives of the trade and of the Government that appellees could not operate except at a loss under Regulation 142 [R. 121, 187, 221, 165, 166-167, 238]. Appellees were advised that it would not be necessary for them to file a written protest, inasmuch as appropriate relief could be given by the local office without the time necessarily incurred by the technical protest described in the Price Procedural Regulations [R. 163, 185, 237]. They were further advised that it would not be necessary for them to hire attorneys [R. 237]. The appellees informed the officials that they would have to either disregard Regulation 142 and continue under Order L-117 or close their doors [R. 121, 195-196]. The Government officials agreed that the dealers could continue under Order L-117 [R. 121, 188, 189, 221]. The dealers therefore continued to operate openly and notoriously under Order L-117, under the sincere belief that they were acting within the law [R. 122, 188, 221].

In formulating Regulation 142, the Director of the Office of Price Stabilization or his representatives made no attempt to, nor did they consult with the appellees or their representatives, or with other dealers in the used wooden agricultural container business [R. 20-21]. Regulation 142 materially altered the industry's historical differences between cost and sales prices by reducing the margin thereof [Cf. Exs. A, B, C, D, and 1].

In its complaints appellant contended that each of the purchasers of the containers sold and delivered at the original over-ceiling price, purchased the same in the course of his trade or business [R. 5]. The evidence failed to show who the purchasers from appellees were, or what use the boxes purchased were put to, although the largest part of their sales were to truckers, growers, packagers and wholesalers [R. 57, 63-64]. No evidence was introduced as to any individual sale, despite the fact that appellees, pursuant to Government subpoena, produced in Court their sales records, including the names of customers [R. 45, 46, 70].

Questions Presented.

1. Whether Regulation 142 was void and the Court below had jurisdiction so to declare.
2. Whether appellant is estopped by the conduct and promises of the officials of the Office of Price Stabilization under the circumstances of this case.
3. Whether, in the event it is determined that Regulation 142 is valid or that the Court below did not have jurisdiction to declare it void and if the appellant is not estopped, the appellant made out a *prima facie* case entitled it to receive damages in any amount.

ARGUMENT.

I.

CPR 142 Is Void and of No Force and Effect and the Court Below Had Jurisdiction so to Determine.

1. In enacting the Defense Production Act of 1950, and in granting to the President of the United States and his authorized representatives power to promulgate orders and regulations affecting trades and businesses, Congress placed definite restrictions upon the powers granted. It is the contention of the appellees that the Government in promulgating Regulation 142 disregarded three factors required by law and that therefore the Regulation was void and *ultra vires*:

(a) 50 U. S. C. App. Section 2102(d)(4) provides:

“After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951 to February 24, 1951, inclusive. . . .”

Regulation 142 lowers the prices set forth in L-117 [Ex. A; R. 92-95], which was the price prevailing immediately before the date of issuance of the regulation, and is also, as to many items, below the ceiling price prevailing during the period January 25, 1951 to February 24, 1951, particularly as to the margin between purchase and sales prices [Ex. C].

(b) 50 U. S. C. App. Section 2102(g) provides:

“The powers granted in this title shall not be used or made to operate to compel changes in the business practices, cost practices or methods, . . . established in any industry. . . .”

A comparison of Regulation 142 [Ex. 1; R. 36-38] with Exhibits C and D demonstrates conclusively the sweeping changes to cost practices and methods as established in the industry. It will be seen that as to all major items the price differential between cost and sales price of merchandise has been narrowed.

(c) 50 U. S. C. App. Section 2104 provides:

“In carrying out the provisions of this title, the President shall, as far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder.”

It was clearly established and found by the Court below that the Director of the Office of Price Stabilization or his representatives made no attempt to, nor did they consult with the appellees or any other dealers in appellees' line of business [R. 21].

The Government argues in Brief, pages 11-13, that this provision in the Defense Production Act is meaningless by reason of 50 U. S. C. App. Section 2159, which provides that although any regulation issued shall be accompanied by a statement that there has been a consultation with industry representatives and etc., the regulation shall not be invalid by reason of the inaccuracy of said statement. *Norman-Frank, Inc. v. Arnall*, 196 F. 2d 502, is cited in support of the Government's position.

It would seem that there is some confusion on the part of the Government as between the actions necessary to clothe the Administrator with authority to issue a regulation in the first instance and the accuracy of statements made by him in the regulation. In order to give both sections of the act full validity, it would appear that the President or his representatives would have no power to act until he had first complied with the requisite of industry consultation. Then if he subsequently inaccurately stated the extent of such representation, such inaccuracy would not invalidate the act which was originally properly taken.

(d) We believe that if the regulation is void and *ultra vires* that there can be no question of the right of the trial court to refuse to apply it. In this connection, there is a distinction between determining the validity of a regulation, the jurisdiction for which is expressly denied to the district court, and the determination that the regulation is void as in excess and in derogation of power of the Administrator, and that therefore it is nullity which cannot be enforced. (*Granzon v. Village of Lyons*, 89 F. 2d 83, 85.)

(e) Even if it be said that the trial court did not have the power to declare the regulation void, it is clear that it would have the power to interpret it and determine what it means. (*Armour & Co. v. United States*, 102 Fed. Supp. 987, 990.) In that case the court adopted the language of Justice Minton, then a judge of the Seventh Circuit Court of Appeals, who said in *Bowles v. Simon*, 145 F. 2d 334, 337:

“We do not accept the Administrator’s view that he may promulgate a regulation and then place on it

an interpretation which becomes controlling on the courts. The Administrator has not grown to any such stature. The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow them. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 325, 53 S. Ct. 350, 77 L. Ed. 796, *Bowles v. Nu Way Laundry Company*, 10 Cir. 144 F. 2d 741.

“We think the District Court had a right to determine the meaning of these regulations for itself, although it could not, and did not, undertake to pass upon their validity, since that authority resides in the Emergency Court of Appeals and in the Supreme Court. . . .”

It will be observed that by Regulation 142, the purpose of the regulation is stated to be that of raising the basic prices of those in appellees business by 18 per cent. Examination of the provisions of the regulation demonstrates that prices were actually lowered, rather than raised. In the face of this repugnancy between the provisions of the same regulation, the court would clearly have the power to enforce the more liberal construction in appellees' favor and hold that portion of the regulation which sets forth the dollar and cent prices is inapplicable.

(f) It is to be noted that CPR 142 does not, by its terms, revoke the provisions of L-117, with which latter order the appellees admittedly complied. If the two orders are to be given co-existence, then the Court in a proceeding which is penal in nature, as in the instant case, may apply the more liberal of the orders.

II.

Appellant Is Estopped From Enforcing the Provisions of Regulation 142 by Reason of the Acts and Expressions, Express and Implied, by Its Agents.

It seems clear from the evidence and is not seriously attacked by appellant that the OPS representatives at least tacitly encouraged appellees to continue their operations under Order L-117. It is further clear that the Government representatives were directly responsible for the failure of appellees to file a written protest as directed in Price Procedural Regulation [R. 163]. The appellant now contends that it cannot be estopped by the acts of its agents, and that in the absence of written agreements, appellees are without remedy. There can be no quarrel with the general principles of law enumerated in the cases cited by appellant. However, they are distinguishable upon their facts from the instant case.

Estoppel claimed in the instant case is that the OPS personnel relieved the appellees of their obligation to follow CPR No. 142 and waived procedures requiring *written* protests set forth in the Price Procedural Regulation.

The rationale of the cases holding that the Government cannot be estopped by acts of its agents is merely that by estoppel that which is illegal cannot be made legal. The fact that the Government is a party is not a determining factor, since no party can be estopped into a position contrary to law. Misrepresentation does not prevent

either the citizen or the Government from asserting as illegal that which the law declares to be illegal.

Fed. Crop Insurance Corp. v. Merrill, 332 U. S. 380;

United States v. Stewart, 311 U. S. 60;

Wilber National Bank of Oneonta v. United States, 294 U. S. 120.

Acts or omissions of agents lawfully authorized to bind the United States or direct its course of conduct during a particular transaction may estop the Government.

Lindsey v. Hawes, 2 Black, 67 U. S. 554;

United States v. Standard Oil Co. of Calif., 20 Fed. Supp. 427.

It must be considered that an agent acts within the scope of his authority and in good faith until the contrary is shown. The burden of proof that an agent is not acting within the scope of his authority is upon the party asserting it.

The elements of equitable estoppel are all present in the instant case. These requisites as stated in *Pomeroy's Equitable Jurisprudence* (5th Ed. 1941), pages 191-192, are as follows:

1. Conduct amounting to a representation of material facts.
2. Notice of these facts imputed to the party estopped.
3. Ignorance of these facts by the other party.
4. An expectation, at least, by the party estopped that the other party would act upon the conduct, actual reliance and detriment.

III.

The Government Failed to Sustain Its Burden of Proof so as to Entitle Appellant to Any Damages.

(a) *The sales in question were not shown to be other than in the course of trade or business of the purchasers.* The Government predicated its complaints upon the ground that each of the purchasers of the containers in question purchased them in the course of his trade or business [R. 5]. The evidence introduced failed to show whether or not appellees' customers purchased in the course of their trade or business, although the largest part of them were truckers, growers, packagers and wholesalers [R. 57, 63-64].

By statute, the President is authorized to institute suits only if the person who buys the material or service does so for use or consumption *other* than in the course of trade or business, and in the latter instance only if the purchaser has failed to institute action in his own behalf within a statutory period. The pertinent portions of 50 U. S. C. App. Section 2109(c) provides:

“If any person selling any material or service violates a regulation or order prescribing a ceiling or ceilings, the person who buys such material or service for use or consumption other than in the course of trade or business may . . . bring an action against the seller on account of the over-charge. . . . If . . . the buyer either fails to institute an action . . . or is not entitled for any reason to bring an action . . . the President may institute such action on behalf of the United States. . . . Any action under this subsection . . . by the President may be

brought in any court of competent jurisdiction. A judgment in an action for damages . . . under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller.”

If it is the Government’s theory that all sales were in the course of the trade or business of the purchaser, then no suit would lie for the recovery of over-charges (*United States v. Yaffe*, 113 Fed. Supp. 382, 385-386), nor *contra* as to sales made not in the course of the purchaser’s trade or business could recovery be had, unless the Government showed that no suit has been instituted by the purchasers. Appellees admission that they knew of no such suit would hardly be sufficient to supply this necessary allegation.

(b) *No showing that sales were made while Regulation 142 was alleged to be in effect.* The complaints allege [R. 5] and it was stipulated [R. 13-14] that the *sales in question were made from May 5, 1952 to January 31, 1953.* However, it was proved at the trial and found by the Court that *all price ceilings as to the appellees were removed January 20, 1953* [R. 21].

Thus, even assuming Regulation 142 to be enforceable, it ceased as of January 20, 1953, and any sales consummated between January 20 and January 31, 1953 were not subject to its terms. The Government failed to supply the Court with any data whatsoever in this connection. Hence, if the Court had upheld the validity of the order and its enforceability, it would have lacked sufficient data to render a monetary judgment. Again, the Government

subpoenaed the necessary sales records to establish these matters, but did not use them.

(c) *In any event, appellant would not be entitled to triple damages.*

Taking the strongest view against appellees, there can be no question as to the good faith in their dealings, and to the fact that they were led into their position by the acts of responsible Government officials. Triple damages are a matter within the discretion of the trial court. 50 U. S. C. App. Section 2109(c).

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be sustained.

LILLIE & BRYANT, and

WALTER M. CAMPBELL,

Attorneys for Appellees.

February, 1955.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

DIX BOX COMPANY AND BENJAMIN DIX, DOING BUSINESS
AS DIX BOX COMPANY, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

HELEN CARVAJAL, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

REPLY BRIEF FOR APPELLANT

WARREN E. BURGER,
Assistant Attorney General.

LAUGHLIN E. WATERS,
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SAMUEL D. SLADE,
JOHN J. COUND,

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FILED

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REPLY BRIEF FOR THE UNITED STATES

In Part III of their brief on this appeal the appellees have contended that the Government had no power to recover in a civil action for the overcharges alleged in these cases, and that in any event the Government has failed to establish its right to any damages. Because we regard these contentions as erroneous, and inasmuch as they concern issues not dealt with in the Government's initial brief, we file this reply brief directed at that part of the appellees' argument.

1. In its complaint the Government alleged that each of the purchasers of containers in the transactions complained of "purchased the same in the course of trade or business" (R. Dix 5). The appellees contend that in these circumstances the Defense Production Act makes no provision for any action for damages by the Government. They assert that the Government's right to sue under Section 409(c) is limited to cases in which the purchaser has bought the controlled material or service for use or consumption other than in the course of trade or business. This construction of the statute is clearly in error, and conflicts squarely with decisions of this Court interpreting an almost identical provision of the Emergency Price Control Act. *Bowles v. Glick Brothers Lumber Company*, 146 F. 2d 566, certiorari denied, 325 U.S. 877, rehearing denied, 326 U.S. 804; *Bowles v. Ray*, 146 F. 2d 652, certiorari denied, 325 U.S. 875; see also *Augustine v. Bowles*, 149 F. 2d 93.¹

¹ The critical phrases in the Defense Production Act:

"* * * the person who buys such material or service for use or consumption other than in the course of trade or business

It is true that Section 409(c) permitted only those private parties to bring suit whose purchases had been for use or consumption other than in the course of trade or business. Commercial buyers were considered in *pari delicto* and were given no right to recover for themselves. But the Government was authorized to sue for overcharges both when a purchaser who could have brought the action had not done so within thirty days, and when the purchaser was one who was "not entitled for any reason to bring the action." Thus the Government could recover whether the sale had been to a consumer who was entitled to bring suit himself or to a commercial user who was not. The only difference was

may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge"

and

"and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the President may institute such action on behalf of the United States within such one-year period"

are identical to those in Section 205(e) of the Emergency Price Control Act with the exception that in the latter the word "commodity" appears in place of "material or service" and the word "Administrator" in place of "President".

The appellees cite, in support of their contention, *United States v. Yaffe*, 113 F. Supp. 382 (E.D. Okla.) where Judge Wallace stated that it might be questioned whether the Government could recover for overcharges on purchases made in the course of trade or business. The statement was dictum inasmuch as the decision denying recovery to the Government was rested on another point, and it may be noted that three days later, sitting in another court, Judge Wallace, without mentioning the issue, granted the Government recovery with respect to purchases of the same commodity involved in *Yaffe* made in the course of trade or business by one of the same purchasers. *United States v. Saunders*, 113 F. Supp. 386 (W.D. Okla.), reversed on other grounds, 214 F. 2d 744 (C.A. 10).

that in the former case the Government must first allow the aggrieved private party thirty days in which to bring his own action. After thirty days, the nature of the purchase was immaterial to the Government's right to sue.

In the instant case, there was testimony to substantiate the Government's allegation that the purchasers involved in the transactions complained of had bought the containers in the course of their trade or business (R. Dix 30-80). The trial court, however, ruled that this proof was not needed, and that "it is only necessary for the government to establish the fact that the wooden containers were sold, and after they were sold and delivered, I am not interested in what happened to them" (R. Dix 54). In view of this ruling, which the appellees have not contested in their brief, the Government's right to bring this suit seems clearly established.

Moreover, it appears that the Government was entitled to bring this action regardless of the nature of the purchases. For the appellees admitted in the Stipulation as to Remaining Issues—filed more than a year after any of the alleged violations—that they knew of no actions brought by a purchaser within thirty days after any of the sales involved (R. Dix. 14). The Government moved to amend its complaint in this respect (R. Dix. 54) but the trial judge, having previously stated his opinion that this was a matter of defense (R. Dix. 47-48) and having held that the Government had to prove no more than the fact of the sales (which were stipulated, R. Dix 14), asked that this motion and any others be postponed until after the evidence was in (R. Dix. 54). At the close of evidence, the judge, after a brief and unrecorded col-

loquy, immediately announced his decision in favor of the defendants (R. Dix. 245). At this point a renewal of the motion to amend would obviously have served no useful purpose.

In the light of these facts, it seems clear that the Government has established its right to sue for these overcharges. But should this Court believe otherwise, we respectfully submit that, the decision below having been made on other grounds after rulings in the Government's favor on this question, the case should be remanded for a further trial on this issue.

2. The Government brought these actions to recover for overcharges received by the appellees in excess of ceiling prices between May 5, 1952, and January 31, 1953. The number of sales and the prices charged during that period were stipulated prior to trial (R. Dix 13-14), and no other evidence was introduced with respect to the amount of these sales. The appellees contend that inasmuch as the trial judge found that all ceilings with respect to the appellees were removed on January 20, 1953, the Government has failed to prove that it is entitled to any damages, because it did not submit any evidence on the basis of which the trial court could have differentiated between sales prior to January 20, 1953, and sales subsequent thereto.

There is no basis in the record for finding that price regulations with respect to the appellees expired on January 20, 1953. The Government in its complaint alleged that Ceiling Price Regulation 142 continued in full force and effect through February 16, 1953 (R. Dix 4). The Stipulation as to Remaining Issues stated the Government's contention "that CPR 142 was valid, and in full force and effect during this pe-

riod" (R. Dix 16). The issue which the appellees now raise was not mentioned during the trial, and the question of the date of the regulation's termination arose only incidentally in connection with an attempt to place the time at which investigation of the alleged violations had begun. The Assistant United States Attorney erroneously stated in answer to a question during a colloquy that the appellees' ceilings went off on January 18, 1953 (R. Dix 204). Don F. Clark, a former enforcement attorney for OPS, called by the appellees, stated only that the regulations governing the appellees were lifted in "the last two weeks of January" (R. Dix 209). Even though he stated that January 18—a date apparently rejected by the trial court—"would be very close", there was nothing in his testimony that would permit a definite finding that the regulation expired before the end of the last two weeks of January, *i.e.*, January 31, 1953.

CPR 142 was issued April 29, 1952, and was published in the Federal Register, 17 F.R. 3822. If the appellees desired to prove that this regulation had ceased to have any effect before the end of the period for which the Government was bringing suit, it was clearly incumbent upon them to show by what action and under what authority it was terminated. This they failed to do. Moreover, it affirmatively appears that the regulation did not expire before that time. On September 3, 1952, General Overriding Regulation 34 was published in the Federal Register. 17 F.R. 7981. This regulation, effective August 29, 1952, stated:

All lumber items, wood products, and connected services totally exempted from price control will be included in this General Overriding Regula-

tion. It is contemplated that OPS will publish a number of exemption actions pertaining to lumber, wood products, and connected services, and the issuance of this GOR at this time serves to establish a single document for the listing of such actions.

Thus any order rescinding CPR 142 should be found as a part of GOR 34 or as an amendment thereto. But there is nothing in that Regulation in its initial form or in its first seven amendments which affects the force and effect of CPR 142.² Nothing of this nature appears until February 18, 1953, when OPS issued Amendment 8 to GOR 34, which declared (18 F.R. 1010, 1011):

All lumber and wood products and allied commodities and services covered by the Forest Products Division of the Office of Price Stabilization and sold in the continental United States, and its territories and possessions such as, but not limited to, logs, lumber, veneer, *containers*, turned and shaped wood products, plywood, treated and untreated poles and pilings, millwork, and logging and hauling services are hereby exempted from price control. [Emphasis supplied.]

Thus it is clear that CPR 142 was in full force and effect throughout the period during which the overcharges upon which the United States has brought these actions occurred.

² 17 F.R. 7981; Amendment 1, September 25, 1952, 17 F.R. 8581; Amendment 2, October 17, 1952, 17 F.R. 9242; Amendment 3, November 12, 1952, 17 F.R. 10299; Amendment 4, January 9, 1953, 18 F.R. 228; Amendment 5, January 28, 1953, 18 F.R. 630; Amendment 6, February 5, 1953, 18 F.R. 774; Amendment 7, February 5, 1953, 18 F.R. 775.

CONCLUSION

For the foregoing reasons, together with the reasons stated in our principal brief, it is respectfully submitted that the judgment of the court below should be reversed.

WARREN E. BURGER,
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LAUGHLIN E. WATERS,
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No. 14441

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
HELEN CARVAJAL,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern District of California, Central Division

Civil No. 15461-BH

UNITED STATES OF AMERICA, Plaintiff,

vs.

HELEN CARVAJAL, Defendant.

COMPLAINT FOR DAMAGES

The United States of America brings this suit against the above named defendant and alleges:

I.

This is a civil action brought to recover damages for violations by defendant of a price stabilization regulation issued pursuant to the Defense Production Act of 1950, as amended (50 U.S.C. App. Sec. 2061, et seq.). Jurisdiction of this suit is vested in this Court by Section 706(b) of the Defense Production Act of 1950, as amended [50 U.S.C. App. Sec. 2156(b)], and also by Section 1345, Title 28, United States Code.

II.

The defendant Helen Carvajal is, and at all times herein mentioned was, engaged in the business of reconditioning and selling used wooden agricultural containers under the trade name of Triangle Box & Crate Service, having her principal place of business at 475 South Fetterly Avenue, Los Angeles, California, which is within the territorial limits of the jurisdiction of this Court.

III.

On April 29, 1952, acting pursuant to the Defense Production Act of 1950, Executive Order 10161 (15 F.R. 6105), and Economic Stabilization Agency General Order No. 2 (16 F.R. 738), the Director of Price Stabilization issued Ceiling Price Regulation 142 (17 F.R. 3822), which became effective on May 5, 1952 and continued in full force and effect from said date to and including February 16, 1953.

IV.

Ceiling Price Regulation 142 established dollars and cents ceiling prices for certain sales of used wooden agricultural containers, including those mentioned in paragraph V hereof. At all times herein mentioned:

(a) Section 2 of this Regulation specified dollars and cents ceiling prices for each of the various kinds of agricultural containers including those sold in the sales and deliveries mentioned in paragraph V hereof.

(b) Section 10(a) of this Regulation prohibited the sale of any used wooden agricultural container at a price in excess of the ceiling price established therefor.

V.

During the period beginning May 5, 1952 and continuing to and including January 31, 1953, defendant sold and delivered certain used wooden agricultural containers at prices totalling \$832.21 in excess of the ceiling prices established by Ceiling Price Regulation 142. Said sales and deliveries are identi-

fied in Schedule A, which is attached hereto and made a part hereof, and which sets forth the quantity of each type of container sold during said period, the unit price charged and received therefor, the unit ceiling price applicable thereto, and the amount of the overcharges received by defendant in said sales and deliveries.

VI.

The purchasers of the containers sold and delivered in the sales and deliveries identified in Schedule A purchased the same in the course of their trade or business, but each of such sales and deliveries occurred more than 30 days prior to the filing of this complaint and none of such purchasers has filed a suit for damages arising out of any of said transactions. None of said sales or deliveries arose because defendant acted upon or in accordance with the written advice or instructions of the President of the United States, or any officer or employee authorized to act for him. None of said sales or deliveries arose out of the sale of any material or services to any agency of the Government pursuant to the lowest bid made in response to an invitation for competitive bids.

Wherefore, plaintiff prays for judgment against defendant Helen Carvajal, as follows:

1. For the sum of \$2,496.63, being treble the amount of the total overcharges made in the sales and deliveries mentioned in paragraph V hereof;
2. For reasonable attorney's fees and costs of litigation as determined by the Court;

3. For its court costs incurred herein; and
4. For such other and further relief as the Court may deem just and equitable.

WALTER S. BINNS,
 United States Attorney
 CLYDE C. DOWNING,
 Assistant U. S. Attorney, Chief of
 Civil Division

/s/ By ALDEN F. HOUCK,
 Special Assistant to the United
 States Attorney

SCHEDULE "A"

Type of Container Sold	No. of contain- ers sold during period	Selling price per container	Ceiling price per con- tainer**	Per con- tainer	Overcharge Total
Flat—Sanded	11,675	\$0.17	\$0.15	\$0.02	\$233.50
Lug—Sanded	19,714	.16	.15	.01	197.14
Lug—Sanded	12,331	.17	.15	.02	246.62
Celery	789	.16	.15	.01	7.89
Celery	230	.17	.15	.02	4.60
Celery	652	.18	.15	.03	19.56
Celery	421	.20	.15	.05	21.05
Celery-Delivered*	2,037	.22	.17	.05	101.85

Total Overcharges \$832.21

* These containers were sold "Delivered"; accordingly ceiling prices were adjusted to reflect a credit of 2c per container for this service.

** All containers were considered to be "Dealer Grade 1".

[Endorsed]: Filed May 1, 1953.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Helen Carvajal, and for answer to the complaint filed herein admits, denies and alleges as follows:

First Defense

The complaint fails to state a cause of action which entitles the plaintiff to any relief whatsoever.

Second Defense

For answer to paragraphs I, II and III of the complaint filed herein, the defendant admits the factual allegations therein contained.

Third Defense

For answer to the allegations contained in paragraph IV of the complaint filed herein the facts contained therein are neither admitted nor denied, but the defendant calls for strict proof thereof.

Fourth Defense

For answer to paragraph V of the complaint filed herein, the defendant denies that at any time that she sold and/or delivered certain used wooden agricultural containers at any price whatsoever in excess of the ceiling prices established by Ceiling Price Regulation 142. The remaining allegations of said paragraph are neither admitted nor denied, but the defendant calls for strict proof thereof.

Fifth Defense

The defendant has no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph VI of the complaint filed herein.

Sixth Defense

Plaintiff has stated no facts entitling him to receive punitive damages and therefore, the plaintiff's requests for punitive damages should be stricken from the complaint.

Seventh Defense

That Ceiling Price Regulation 142 (17 F.R. 3822) does not apply to this defendant. That said Regulation applies only to "Dealers" and "Retailers". That this defendant is neither a "Dealer" nor a "Retailer".

Wherefore, the premises considered, the defendant demands that the complaint filed herein be dismissed with prejudice; and for such other and further relief as to the court may seem just and equitable.

/s/ RICHARD ALLAN WEISS,
Attorney for Defendant

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 14, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The above-entitled cause came on regularly for trial on the 5th day of April, 1954, before the Honorable Harry C. Westover, Judge presiding, sitting without a jury, a jury having been expressly waived, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney and James R. Dooley, Assistant United States Attorney, by James R. Dooley appearing for the plaintiff, and Richard Allan Weiss appearing for the defendant, and evidence having been introduced by stipulations then and theretofore entered into by the parties through their respective counsel, and the cause having been submitted for decision on the 5th day of April, 1954, and being fully advised in the premises the Court now makes its Findings of Fact as follows:

I.

That the defendant was engaged in the business of reconditioning and selling used wooden agricultural containers under the trade name of Triangle Box and Crate Service, having her place of business at 475 South Fetterly Avenue, Los Angeles, California, which is within the territorial limits of the jurisdiction of this court.

II.

That the defendant bought all of her used agricul-

tural containers from persons who were and are dealers within the meaning of Section 12b of Ceiling Price Regulation 142.

III.

That under and by virtue of the authority vested in the President of the United States by the Defense Production Act of 1950, which authority was theretofore duly delegated by him to the Director of Price Stabilization, ceiling prices to be obtained by persons in the resale of used wooden agricultural containers, including the defendant, were fixed at the highest prices obtained by them during the period December 20, 1950, to January 19, 1951, as provided by the general ceiling price regulation.

IV.

That because of the seasonal variations of the fruit and vegetable business's ceiling prices, the said prices which became effective under general ceiling price regulation as referred to herein, were established during a period of few sales and proved to be inadequate for a large segment of the used container industry and particularly with respect to the prices obtained by the major items sold by the defendant.

V.

That by reason of the above-mentioned inequities, the defendant, together with others in the similar business, engaged attorneys and filed protests with the Office of Price Stabilization in Washington, D. C. That as a result thereof, the Office of Price Stabilization issued its certain order, known as

Order L-117, establishing dollar and cents maximum ceiling prices for those certain types of containers which are the principal commodities sold by the defendant. That from and after the issuance of said Order L-117, up to and including the 31st day of January, 1953, which period includes the time that all of the acts complained of as having been performed by the defendant herein, the defendant resold used wooden agricultural containers at a price not to exceed the ceiling prices referred to in said Order L-117 or in excess of the prices set by general ceiling prices regulation as to those commodities not affected by Order L-117.

VI.

That on or about April 29, 1952, the Office of Price Stabilization over the signature of the Director of Price Stabilization purported to promulgate that certain Ceiling Price Regulation No. 142, and prior to the promulgation of Ceiling Price Regulation No. 142, and prior to the dollar and cents ceiling prices for retailers and dealers as set forth therein, the said Director of the Office of Price Stabilization or his representatives made no attempt to, nor did they consult with the defendant or her predecessors in interest, or with any other person engaged in the resale of used wooden agricultural containers.

VII.

That after learning of the purported Ceiling Price Regulation No. 142, the Association of Used Agricultural Container Dealers and Sellers, of

which the Triangle Box and Crate Service was a member, held meetings with the duly authorized representatives of the Office of Price Stabilization at Los Angeles, California. That as a result of said meetings, the said Association informed the duly authorized representatives of the Office of Price Stabilization that they would and thereafter did continue to comply with the ceiling prices as established by the said Order L-117 and the General Ceiling Price Regulation. That the defendant followed the examples of the Association and that such acts of the Association and the defendant were open and notorious and known at all times to the said officials of the Office of Price Stabilization, who did not object thereto. That in so conducting her business, the defendant and the Association, and each of them, did so in reliance and belief that they were fully and adequately complying with the law and regulations applicable to such sales.

Conclusions of Law

That Ceiling Price Regulation No. 142 is void and of no force and effect whatsoever by reason of the fact that the said regulation is arbitrary and that no effort was made by the Office of Price Stabilization to comply with the provisions of Title 50 U.S.C. Appendix, Section 2104 in advising or consulting with the members of the Industry with respect thereto.

II.

That the President of the United States and those to whom he has delegated authority are estopped

from enforcing the provisions of purported Ceiling Price Regulation 142 by reason of the conduct and promises, expressed and implied, by said officials as aforesaid.

III.

That the defendant is not a dealer within the meaning of Section 12b of Ceiling Price Regulation 142.

IV.

That the plaintiff, United States of America, have and recover nothing by their suit.

Let judgment be entered accordingly.

Dated this 16th day of April, 1954.

/s/ HARRY C. WESTOVER,

Judge of the U. S. District Court

Affidavit of Service by Mail attached.

[Endorsed]: Lodged April 12, 1954.

[Endorsed]: Filed April 16, 1954.

In the United States District Court, Southern District of California, Central Division

Civil No. 15461-HW

UNITED STATES OF AMERICA, Plaintiff,

vs.

HELEN CARVAJAL,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 5th day of April, 1954, before the Honorable Harry C. Westover, Judge presiding, sitting

without a jury, a jury having been expressly waived, Laughlin E. Waters, United States Attorney, Max F. Deutz, Assistant United States Attorney and James R. Dooley, Assistant United States Attorney, by James R. Dooley appearing for the plaintiff, and Richard Allan Weiss appearing for the defendant, and evidence having been introduced by stipulations then and theretofore entered into by the parties through their respective counsel, and the cause having been submitted for decision on the 5th day of April, 1954, and the court having heretofore made and caused to be filed its written findings of fact and conclusions of law;

It Is Ordered, Adjudged and Decreed that the plaintiff, United States of America, have and recover nothing by their suit.

Dated this 16th day of April, 1954.

/s/ HARRY C. WESTOVER,

Judge of the U. S. District Court

Affidavit of Service by Mail attached.

[Endorsed]: Lodged April 12, 1954.

[Endorsed]: Entered and Filed April 16, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on April 16, 1954.

Dated April 28, 1954.

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief,

Civil Division

/s/ JAMES R. DOOLEY,

Assistant U. S. Attorney,

Attorneys for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 45, inclusive, contain the original Complaint; Answer; Request for Admission; Objections to Request for Admission; Notice of Motion for Summary Judgment filed Feb. 16, 1954; Answer to Motion for Summary Judgment; Notice of Motion for Summary Judgment filed April 2, 1954; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to

Docket Appeal and a full, true and correct copy of Minutes of the Court for March 1, 1954, and April 5, 1954, which together with Reporter's Transcript of Proceedings on February 11 and 12, 1954, and the original exhibits, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 19th day of July, 1954.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy

[Endorsed]: No. 14441. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Helen Carvajal, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 20, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14441

UNITED STATES OF AMERICA, Appellant,

vs.

HELEN CARVAJAL, Appellee.

STATEMENT OF POINTS ON APPEAL

The appellant hereby designates the following points on appeal in the above entitled matter:

1. The District Court was without jurisdiction to declare Ceiling Price Regulation No. 142 void and of no force and effect.

2. The District Court erred in declaring Ceiling Price Regulation No. 142 void and of no force and effect for failure of the Office of Price Stabilization to comply with the provisions of 50 U.S.C. App. Sec. 2104.

3. The District Court erred in finding that the conduct of the officials of the Los Angeles Office of the Office of Price Stabilization estopped the President and those to whom he had delegated authority from enforcing Ceiling Price Regulation No. 142.

4. The District Court erred in finding that the defendant was not a dealer within the meaning of

Section 12(b) of Ceiling Price Regulation No. 142.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,
Assistant U. S. Attorney

/s/ JAMES R. DOOLEY,
Attorneys for Appellant

[Endorsed]: Filed September 15, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED

Appellant above named hereby designates the following portions of the record to be printed in the above entitled matter:

1. Docket entries;
2. Complaint for Damages;
3. Answer;
4. Findings of Fact and Conclusions of Law;
5. Judgment;

6. Notice of Appeal;
7. Statement of Points on Appeal; and
8. Designation of Record to be Printed.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney, Chief of
Civil Division

JAMES R. DOOLEY,
Assistant U. S. Attorney

/s/ JAMES R. DOOLEY,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 15, 1954. Paul P.
O'Brien, Clerk.

No. 14454

United States
Court of Appeals
for the Ninth Circuit.

ARTURO FLETES-MORA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the
United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California.
Central Division.

FILED

DEC 24 1954

No. 14454

United States
Court of Appeals
for the Ninth Circuit.

ARTURO FLETES-MORA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the
United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

DAVID C. MARCUS,
206 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
JAMES R. DOOLEY,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

United States District Court, Southern District of
California, Central Division

Civil Action No. 16094-WM

ARTURO FLETES-MORA,

Petitioner,

vs.

HERBERT BROWNELL, Attorney General of the
United States,

Respondent.

PETITION FOR DECLARATION OF UNITED
STATES NATIONALITY AND FOR DE-
CLARATORY RELIEF

Comes Now the petitioner above named and com-
plains and alleges:

I.

The above Court has jurisdiction of the within
matter under the provisions of section 2201, Title
28, U. S. C. A. and under section 360(a) of Public
Law No. 414, 66 Stat. 273.

II.

Petitioner herein is a constitutional native citi-
zen of the United States, born on the 23rd day of
September, 1925, at Los Angeles, California, and is
presently residing in the City and County of Los
Angeles, State of California, within the jurisdiction
of the above-entitled Court. [2*]

***Page numbering appearing at foot of page of original Certified
Transcript of Record.**

III.

Petitioner herein claims the rights and privileges as a citizen and national of the United States and has been denied such rights and privileges by the respondent herein on the ground that said respondent contends that he is not a citizen of the United States, but an alien and citizen and national of the Republic of Mexico, and is not entitled to the rights and privileges as a citizen of the United States.

IV.

Petitioner alleges that he is in truth and in fact a constitutional citizen and national of the United States and is entitled to all the rights and privileges as a citizen of the United States. That the respondent herein has denied petitioner his rights and privileges as a citizen of the United States in that it was determined that he is a citizen and national of the Republic of Mexico, and not entitled to be and remain in the United States, or to enter the United States as a citizen thereof, in violation of petitioner's rights and privileges as a citizen of the United States.

V.

Petitioner alleges that an actual and bona fide dispute exists between said petitioner and the respondent herein concerning his status as a citizen and national of the United States. The respondent contends that petitioner is an alien and not a citizen of the United States and is not entitled to remain in the United States. Petitioner contends that he is a constitutional native-born citizen of the United States and as such is entitled to all the rights

and privileges, and immunities as a citizen of the United States, and entitled to be and remain here as such citizen.

VI.

Petitioner alleges that his status as a national of the [3] United States did not arise out of or in connection with any exclusion proceedings under the provisions of Public Law 414, 66 Stat. 273, or any other Act, or is an issue in such exclusion proceedings.

Wherefore, petitioner prays judgment adjudging and declaring him to be a citizen and national of the United States.

That pending the determination of the litigation, the respondent be restrained and enjoined from refusing petitioner the rights and privileges as an American citizen and national to be and remain in the United States; and

For such other and further relief as to this Court may seem just and proper.

/s/ DAVID C. MARCUS,
Attorney for Petitioner.

Duly Verified.

[Endorsed]: Filed November 30, 1953. [4]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL UNDER RULE
12(b)(1)(2)(6) F.R.C.P.

Comes Now the defendant above named and without waiving any of his objections to the jurisdiction

of the Court and especially appearing for the purpose of this Motion only, by and through his attorneys, Laughlin E. Waters, United States Attorney and Robert K. Grean, Assistant United States Attorney, by Robert K. Grean, and moves the Court for dismissal of the within action pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the following grounds:

- (1) Lack of jurisdiction over the subject matter.
- (2) Lack of jurisdiction over the person, and
- (6) Failure to state a claim upon which relief can be granted.

This Motion is based and will be presented upon the Complaint of the plaintiff filed herein, upon these Motion papers, upon the Order to Show Cause heretofore issued by the above-entitled Court, and upon the Memoranda of Points and Authorities heretofore filed and those attached hereto.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney, Assistant Chief of Criminal Division, Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 19, 1954. [8]

[Title of District Court and Cause.]

ORDER ON MOTION TO DISMISS

This cause having come before the court for hearing on motion of defendant, filed February 19, 1954, to dismiss the action, and the motion having been argued and submitted for decision; and it appearing to the court:

(1) that plaintiff sues “for declaration of United States nationality and for declaratory relief” seeking a judgment “declaring him to be a citizen and national of the United States”;

(2) that plaintiff invokes the jurisdiction of this court “under the provisions of section 2201, Title 28, U. S. C. A. and under section 360(a) of Public Law No. 414, 66 Stat. 273” [8 U. S. C. § 1503];

(3) that 28 U. S. C. § 2201 authorizing declaratory judgments does not confer any added jurisdiction [11] upon the federal courts but merely enlarges the “range of remedies available” [Skelly Oil Co. vs. Phillips Co., 339 U. S. 667, 671 (1950); Southern Pac. Co. vs. McAdoo, 82 F.2d 121 (9th Cir. 1936)];

(4) that although “Herbert Brownell, Attorney General of the United States” is the defendant named, the action is in legal effect one against the Government [Larson vs. Domestic & Foreign Corp., 337 U. S. 682 (1949); cf. Morrison vs. Work, 266 U. S. 481, 486-488 (1925)]; and this court has jurisdiction to adjudicate actions against the Gov-

ernment only in instances and under circumstances expressly consented to by the sovereign through act of Congress [*Munro vs. United States*, 303 U. S. 36 (1938); *United States vs. Clarke*, 8 Pet. (33 U. S.) 436, 443 (1834)];

(5) that by 8 U. S. C. §1503(a) the Government has consented to be sued in this court in an action such as that at bar only in cases where the controversy as to status did not arise in, and is not in any way connected with, an exclusion proceeding, and there has been final administrative denial within five years of the claimed “right or privilege as a national of the United States” [see *Gonzalez-Gomez vs. Brownell*, 114 F. Supp. 660, 661 (S.D. Cal. 1953); cf. *Lynch vs. United States*, 292 U. S. 571, 582 (1934); *Fouts vs. United States*, 67 F.2d 249, 250 (5th Cir. 1933)];

(6) that plaintiff does not allege that either of the conditions to sovereign consent mentioned in paragraph (5) above has been met in the action at bar;

(7) that plaintiff does not seek judicial review of administrative action within the jurisdiction [12] conferred upon this court by the Administrative Procedure Act, 5 U. S. C. §§ 1001, 1009 [cf. *Blackmar vs. Guerre*, 342 U. S. 512, 515-516 (1952); *Heikkila vs. Barber*, 345 U. S. 229, 230-233 (1953)];

(8) that the case does not arise under the Civil Rights Act [42 U.S.C. §§ 1981-1994], so jurisdiction is not conferred by 28 U. S. C. §1343 [cf.

Hague vs. CIO, 101 F.2d 774, 787-790 (3d Cir. 1939), modified and affirmed, 307 U. S. 496, 506-514, 527-532 (1939)];

(9) that since this court has no general grant of jurisdiction over the status of aliens or nationals or citizens [see *Grace vs. American Central Ins. Co.*, 109 U. S. 278 (1883)]; and the Government has not waived sovereign immunity to suit under the circumstances alleged, jurisdiction is lacking at bar over both the subject matter of the action and the person of the defendant in his official capacity [cf. *Long vs. United States*, 78 F.Supp. 35 (S.D. Cal. 1948)];

(10) that if the action could be construed as a suit against Herbert Brownell in his individual capacity, jurisdiction over the subject matter would exist, assuming the requisite amount is involved, because "the matter in controversy * * * arises under the Constitution, laws or treaties of the United States" [28 U. S. C. § 1331]; but present jurisdiction of this court over the person of the defendant, qua individual, would remain lacking [cf. *McGrath vs. Kristensen*, 340 U. S. 162, 169-170 (1950); *Williams vs. Fanning*, 332 U. S. 490 (1947); *Perkins vs. Elg*, 99 F.2d 408, 409-410, 413-414 (D.C. Cir. 1938), modified and affirmed, 307 U. S. 325, 328, 349-350 [13] (1939); *National Conf. etc. Lotteries vs. Goldman*, 85 F.2d 66 (2d Cir. 1936)];

It is Ordered that defendant's motion to dismiss for lack of jurisdiction over both the subject matter

and the person of the defendant is hereby granted [Fed. Rules Civ. Proc., Rule 12(b)(1)(2), (h), 28 U. S. C. A. 335, 336 (1951)].

It is Further Ordered that the defendant serve and lodge with the Clerk within five days a judgment of dismissal to be settled under local rule 7.

It is Further Ordered that this dismissal shall not operate as an adjudication upon the merits [Fed. Rules Civ. Proc., Rule 41(b), 28 U. S. C. A. at 380], and the judgment shall so provide.

It is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

March 11, 1954.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed March 11, 1954. [14]

In the United States District Court in and for the
Southern District of California, Central Division

No. 16094-WM Civil

ARTURO FLETES-MORA,

Plaintiff,

vs.

HERBERT BROWNELL, Attorney General of the
United States,

Defendant.

JUDGMENT OF DISMISSAL

The above-entitled matter came on regularly for hearing on defendant's Motion for Dismissal under Rule 12(b)(1)(2)(6) of the Federal Rules of Civil Procedure on March 1, 1954, in the above-entitled Court, before the Honorable William C. Mathes, Judge Presiding, the plaintiff being represented by his attorneys, David C. Marcus and William Bronsten, by David C. Marcus, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, and Robert K. Grean, Assistant U. S. Attorney, by Robert K. Grean; and the Court having considered defendant's Motion for dismissal and counsels' Memoranda in regard thereto, and having heard the oral argument of counsel, and having heretofore on the 11th day of March, 1954, filed its Order on Motion to Dismiss, and being fully advised in the premises,

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed that plaintiff's Petition for Declara-

tion of United States Nationality and for Declaratory Relief be, and the same is hereby dismissed for lack of jurisdiction over the subject matter and lack of jurisdiction over the person (Federal Rules of Civil Procedure, Rule 12(b)(1)(2)). [15]

It is Further Ordered that this Dismissal shall not operate as an adjudication upon the merits.

It is Further Ordered that the defendant have costs against the plaintiff. Costs taxed at \$20.00.

Dated: This 29th day of March, 1954.

/s/ WM. C. MATHES,

Judge, U. S. District Court.

Affidavit of Service by Mail attached.

Lodged March 17, 1954.

[Endorsed]: Filed March 30, 1954.

Docketed and entered March 30, 1954. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the petitioner in the above-entitled action hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, entered in said matter on the 30th day of March, 1954.

Dated: This 25th day of May, 1954.

/s/ DAVID C. MARCUS,

Attorney for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 27, 1954. [18]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages consist of the original Petition for Declaration of United States Nationality and Declaratory Relief; Motion for Dismissal; Order on Motion for Dismissal; Judgment of Dismissal; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of July, A.D. 1954.

[Seal] EDMUND L. SMITH,
 Clerk;

By /s/ THEODORE HOCKE,
 Chief Deputy.

[Endorsed]: No. 14454. United States Court of Appeals for the Ninth Circuit. Arturo Fletes-Mora, Appellant, vs. Herbert Brownell, Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 26, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the Ninth
Circuit

No. 14,454

ARTURO FLETES-MORA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the
United States,

Appellee.

STATEMENT OF POINTS ON APPEAL

The above-named appellant hereby designates the following points on appeal in the above-entitled matter:

That the lower Court erred in dismissing the petition herein for lack of jurisdiction over the subject matter and person of the defendant.

Dated this 10th day of August, 1954.

/s/ DAVID C. MARCUS,

Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 16, 1954.

No. 14454.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTURO FLETES-MORA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the United
States,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED

MAR 17 1955

PAUL P. O'BRIEN, CLERK

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No. 14454.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTURO FLETES-MORA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the United
States,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction of the Court.

Appellant claimed jurisdiction in the Court below [R. 3] under the provisions of Section 2201, Title 28 U. S. C. A. and under Section 360(a) of Public Law Number 414 (Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., §1503(a)). The District Court dismissed appellant's Petition for lack of jurisdiction over the subject matter and lack of jurisdiction over the person [R. 12]. It is the position of appellee that the District Court was without jurisdiction over the subject matter under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, and that insofar as appellant sought relief independent of the latter statute, the Court lacked jurisdiction over both the subject matter and the person of appellee.

Since the judgment of the Court below was a final decision, this Court has jurisdiction of an appeal from that

decision pursuant to 28 U. S. C. A., Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter.

Zank v. Landon, 205 F. 2d 615 (C. A. 9, 1953).

Statement of the Case.

On November 30, 1953 appellant filed in the Court below a Petition for Declaration of United States Nationality and for Declaratory Relief, seeking to be declared a citizen and national of the United States [R. 3-5]. He alleged birth at Los Angeles, California, on September 23, 1925 [R. 3]. On February 19, 1954 appellee, appearing specially and without waiving any of his objections to the jurisdiction of the Court, moved the Court for dismissal pursuant to Rule 12(b)(1), (2), and (6), Federal Rules of Civil Procedure [R. 5-6]. On March 11, 1954, the District Court ordered that appellee's motion to dismiss for lack of jurisdiction over both the subject matter and the person be granted, and that such dismissal should not operate as an adjudication upon the merits [R. 7-10]; and on March 30, 1954, judgment was entered accordingly [R. 11-12].

The present appeal was taken from that judgment and presents the following questions:

1. Did appellant's Petition contain sufficient allegations to confer jurisdiction upon the District Court under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, U. S. C. A. 1503(a)?

2. Independent of Section 360(a) of the Immigration and Nationality Act of 1952, did the District Court acquire

jurisdiction over the subject matter or the person of appellee?

3. Does the record furnish a basis for this Court to consider the constitutional issues advanced by appellant?

4. Assuming that this Court deems it proper to consider the constitutional issues advanced by appellant, is there any merit to appellant's contentions?

Statutes Involved.

Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., Section 1503(a) is quoted in Part II of Argument.

Title 28 U. S. C. A., Section 2201, 62 Stat. 964, commonly referred to as the Federal Declaratory Judgment Act, provides:

“§2201. Creation of remedy.

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

Title 28, U. S. C. A., Section 1331, 62 Stat. 930, provides:

“§1331. Federal question; amount in controversy.

“The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.”

ARGUMENT.

I.

Summary.

Appellant's Petition was insufficient to invoke the jurisdiction of the District Court under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, since it contains no averment that appellant was denied any specific right or privilege as a national of the United States upon the grounds that he was not such a national, as required by this statute. Nor does appellant's Petition allege or show that it was filed within five years after the final administrative denial of a claimed right or privilege, as required.

Insofar as appellant claimed relief independent of the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, the District Court lacked jurisdiction over both the subject matter and the person of appellee. The Act authorizing declaratory judgments merely enlarges the range of remedies available in federal courts, and affords no independent basis for federal jurisdiction. Neither may appellant avail himself of Section 1331, Title 28, U. S. C. A., which authorizes jurisdiction of actions arising under the Constitution of the United States, because his Petition does not allege the requisite jurisdictional amount. Even if it be assumed, however, that these statutes permit an action for declaration of nationality independent of Section 360(a), the Court below did not acquire jurisdiction over the person of

appellee for such an action. The Attorney General may be served with process only in the District of Columbia and appellee did not waive this requirement.

Appellant urges that Article III of the Constitution must be read into Section 360(a) of the Immigration and Nationality Act of 1952 and that appellant is being deprived of citizenship without due process. These arguments, constitutional in nature, are not properly before this Court, since the record does not disclose, nor does appellant contend in his brief, that he is unable to allege sufficient facts to bring himself within the purview of Section 360(a). Assuming, however, that this Court deems it proper to pass upon appellant's contentions, the latter are without merit. Only the Supreme Court derives jurisdiction directly from the Constitution; and even if appellant is unable to invoke the provisions of Section 360(a), he will not thereby be deprived of a constitutional right. He will only be relegated to the judicial remedies, such as habeas corpus, which existed prior to the statute.

II.

Appellant's Petition Did Not Contain Sufficient Allegations to Confer Jurisdiction Upon the District Court Under the Provisions of Section 360(a) of the Immigration and Nationality Act of 1952.

There are no presumptions in favor of the jurisdiction of Courts of the United States. (*Grace v. American Central Ins. Co.*, 109 U. S. 278 (1883); *Ex parte Smith*, 94 U. S. 455 (1876)). One seeking the exercise of federal jurisdiction in his favor must allege in his pleading facts essential to show jurisdiction, and if he fails to make the necessary allegations, he has no standing in Court.

Rule 8(a)(1), Federal Rules of Civil Procedure,
28 U. S. C. A.;

McNutt v. General Motors Acceptance Corp., 298
U. S. 178, 189 (1936);

Hanford v. Davis, 163 U. S. 273 (1896);

Engel v. Tribune Co., 189 F. 2d 177 (C. A. 7,
1951);

Joy v. Hague, 175 F. 2d 395 (C. A. 1, 1949),
cert. den., 338 U. S. 870;

Alexander v. Westgate-Greenland Oil Co., 111 F.
2d 769, 770 (C. C. A. 9, 1940);

Royal Service Corp. v. City of Los Angeles, 98 F.
2d 551, 554 (C. C. A. 9, 1938).

The foregoing principle, well established in all cases where federal jurisdiction is claimed, applies to actions for declaratory of nationality.

Elizarraras v. Brownell, 217 F. 2d 829 (C. A.
9, 1954);

Fong Wone Jing v. Dulles, 217 F. 2d 138 (C. A. 9, 1954);

Dulles v. Lee Gnan Lung, 212 F. 2d 73 (C. A. 9, 1954);

Clark v. Inouye, 175 F. 2d 740 (C. A. 9, 1949).

Appellant sought to invoke the jurisdiction of the Court below pursuant to the provisions of Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., Section 1503(a). This statute provides:

“(a) If any person who is within the United States *claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States*, such person may institute an action under the provisions of section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person’s status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. *An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege* and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.” (Emphasis added).

Appellant’s Petition omitted jurisdictional allegations necessary to bring him within the purview of the above

quoted statute. Appellant's Petition contains no averment that he was denied any specific right or privilege as a national of the United States upon the grounds that he was not such a national; nor does the Petition allege or show that it was filed within five years after the final administrative denial of a claimed right or privilege.

Paragraph III of the Petition alleges in general terms [R. 4]:

"Petitioner herein claims the rights and privileges as a citizen and national of the United States and has been denied such rights and privileges by the respondent herein on the ground that said respondent contends that he is not a citizen of the United States, but an alien and citizen and national of the Republic of Mexico, and is not entitled to the rights and privileges as a citizen of the United States."

The remainder of the Petition is no more illuminating. In Paragraph IV appellant alleges that

". . . it was determined that he is a citizen and national of the Republic of Mexico, and not entitled to be and remain in the United States, *or* to enter the United States as a citizen thereof . . ." (Emphasis added).

However, there are no allegations showing when this determination was made, whether it was communicated to appellant, or what specific right or privilege was denied to him as a result of such determination.

This Court was confronted with a similar pleading in *Clark v. Inouye*, 175 F. 2d 740 (C. A. 9, 1954). There, an action was instituted for declaration of citizenship under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, predecessor

to the statute here involved. The amended complaint alleged in part that "the defendants deny that plaintiffs are nationals of the United States and have denied the plaintiffs' rights and privileges as nationals of the United States; and have announced that the plaintiffs do not possess United States nationality or citizenship." This Court held that the allegation was but a conclusion of law and that since it was unsupported by any allegations of fact, the District Court was without jurisdiction, even though the allegation was admitted by the defendants in their answer.

Again, in the recent case of *Elizarraraz v. Brownell*, 217 F. 2d 829 (C. A. 9, 1954), this Court of its own initiative took note of a pleading similarly defective. Here, too, an action for declaration of nationality was instituted under Section 503 of the Nationality Act of 1940; and the Petition alleged that the Attorney General of the United States "has denied the plaintiff his rights and privileges as a national of the United States in that he has decided and determined that the plaintiff is not a national of the United States." In commenting upon the insufficiency of this allegation, Judge Goodman observed (pp. 830-831) :

"[1] The complaint contained *no allegation that appellant was denied any specific right or privilege* as a national by any department or agency of the United States upon the ground that he was not a national of the United States. Indeed, the transcript of the record before us contains neither evidence nor stipulation showing that any officer, agency or department of the United States denied appellant any specified right or privilege as a national on the ground that he was not a national of the United States. Thus we could well affirm the judgment below upon the

ground that there was neither allegation nor proof that appellant was denied any right or privilege as a national upon the ground that he was not a national. See *Fong Wone Jing v. Dulles, Secretary of State*, 9 Cir., 217 F. 2d 138.” (Emphasis added).

The Petition in the case at bar, however, lacks still another jurisdictional averment. Section 360(a) of the Immigration and Nationality Act of 1952 expressly provides that an action thereunder “may be instituted only within five years after the final administrative denial” of a right or privilege. Appellant alleges no facts to show that his Petition was filed within five years after the final administrative denial of a claimed right or privilege, or even to show that a final administrative denial occurred. District courts having occasion to construe Section 360(a) concur that a final administrative denial is required before an action may be maintained under this section. (See: *Linzalone v. Dulles*, 120 Fed. Supp. 107, 109 (D. C., S. D., N. Y., 1954); *Avina v. Brownell*, 112 Fed. Supp. 15, 17 (D. C., S. D., Tex., 1953)); and it is well settled that administrative remedies must be exhausted before resort may be had to the Courts (*Meyers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Samaniego v. Brownell*, 212 F. 2d 891 (C. A. 5, 1954); *Florentine v. Landon*, 206 F. 2d 870 (C. A. 9, 1953)).

It is submitted, therefore, that by reason of appellant's failure to include in his Petition the aforementioned allegations, the District Court did not acquire jurisdiction of the subject matter under the provisions of Section 360(a) of the Immigration and Nationality Act of 1952.

III.

Independent of the Provisions of Section 360(a) of the Immigration and Nationality Act of 1952, the District Court Did Not Acquire Jurisdiction Over Either the Subject Matter or the Person of Appellee.

Appellant also alleged as a basis for jurisdiction Section 2201, 28 U. S. C. A., commonly referred to as the Federal Declaratory Judgment Act [R. 3]. This Act, however, does not provide an independent basis for federal jurisdiction but merely enlarges the range of remedies available in a federal court, where its jurisdiction is otherwise established. (*Skelly Oil Co. v. Phillips Co.*, 339 U. S. 667, 671 (1950); *Southern Pacific Co. v. McAdoo*, 82 F. 2d 121 (C. A. 9, 1936)). Appellant may not therefore rely upon this statute as a jurisdictional basis for his Petition.

In his Opening Brief, appellant, for the first time, seeks to rely upon Section 1331, 28 U. S. C. A., which provides for jurisdiction of civil actions arising under the Constitution, laws or treaties of the United States. In order that jurisdiction may be effectively invoked under this statute, however, the pleading must contain an allegation that the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs (*Hague v. C. I. O.*, 307 U. S. 496, 507-508 (1939); *Joy v. Hague*, *supra*). Appellant's Petition contains no such averment.

Even if it be conceded that an action for declaration of nationality will lie under the Federal Declaratory Judgment Act or under Section 1331, 28 U. S. C. A., the District Court did not acquire jurisdiction over the person of appellee for such an action. The Attorney General of the

United States, appellee, has as his official residence the District of Columbia, and may be served with process only in that district, unless otherwise provided by statute. (Rule 4(d), (5), Federal Rules of Civil Procedure, 28 U. S. C. A.; *Rodriguez v. Landon*, 212 F. 2d 508, 509 (C. A. 9, 1954); *Connor v. Miller*, 178 F. 2d 755 (C. A. 2, 1949); *Avila-Contreras v. McGranery*, 112 Fed. Supp. 264, 267 (D. C., S. D., Cal., 1953); *Bustos-Ovalle v. Landon*, 112 Fed. Supp. 874 (D. C., S. D., Cal., 1953)). Appellee did not consent to jurisdiction over his person, since his Motion for Dismissal was made “without waiving any of his objections to the jurisdiction of the Court and especially appearing for the purpose of this Motion only” [R. 5-6].

IV.

Constitutional Issues Advanced by Appellant.

A. The Record Furnishes No Basis for This Court to Consider the Constitutional Issues Advanced by Appellant.

Appellant contends in his Opening Brief that the “allegations of the Petition involve a justiciable question under Article III of the Constitution of the United States” (p. 4); that the provision in Article III of the Constitution that the “judicial power shall extend to all cases, in law and equity, arising under this Constitution,” is not limited to the Supreme Court, but vested in such inferior courts as the Congress may from time to time establish (pp. 5-6); that Article III of the Constitution must be read into and in connection with the remedy available under Section 360(a) of the Immigration and Nationality Act of 1952 (p. 7); and that the Fifth Amendment affords protection against the deprivation of citizenship without the sanction afforded by judicial proceedings (p. 10).

The foregoing issues, constitutional in nature, are not properly before this Court; since *the record does not disclose, nor does appellant contend in his Opening Brief, that he is unable to allege sufficient facts to bring himself within the purview of Section 360(a) of the Immigration and Nationality Act of 1952*. This Court, in order to decide the constitutional issues raised by appellant, would be compelled to assume that appellant cannot meet the requirements of Section 360(a).

It is well established that a Court will not decide a question of constitutional law upon an abstract, hypothetical or contingent set of facts (*United Public Workers v. Mitchell*, 330 U. S. 75, 86-91 (1947); *Federation of Labor v. McAdory*, 325 U. S. 450 (1945)); neither will a Court pass upon a constitutional issue in advance of the necessity for its decision (*United States v. Rumley*, 345 U. S. 41 (1953); *United States v. Spector*, 343 U. S. 169 (1952)).

If appellant is able to allege sufficient facts to invoke Section 360(a), it will be unnecessary to decide whether the provisions of Article III of the Constitution must be read into that statute. It will also be unnecessary to determine whether one unable to avail himself of the statute is deprived of citizenship without the sanction afforded by judicial proceedings. The dismissal by the Court below was not *res judicata* (*Smith v. McNeal*, 109 U. S. 426 (1883)); and the judgment expressly provided that it should "not operate as an adjudication upon the merits" [R. 12]. Appellant can institute another action, including the necessary averments, and the decision of grave constitutional issues upon a hypothetical set of facts will be avoided.

B. The Constitutional Issues Advanced by Appellant Are Without Merit.

Assuming that this Court deems it appropriate to pass upon the constitutional issues urged by appellant, it is submitted that appellant's position is unsound. Article III of the Constitution may not be employed to confer jurisdiction upon the District Court. Only the Supreme Court of the United States derives jurisdiction directly from the Constitution. Other federal courts have only such jurisdiction as Congress has prescribed.

Kline v. Burke Construction Co., 260 U. S. 226, 233-234 (1922);

People v. Bruce, 129 F. 2d 421, 423 (C. C. A. 9, 1942), cert. den. 317 U. S. 710.

Moreover, even if appellant is unable to allege sufficient facts to obtain a declaration of nationality under Section 360(a) of the Immigration and Nationality Act of 1952, his constitutional rights will not be violated (*Gonzalez Gomez v. Brownell*, 114 Fed. Supp. 660 (D. C. S. D. Calif., 1953); *Avina v. Brownell*, 112 Fed. Supp. 15 (D. C. S. D. Tex., 1953)). Appellant will not as a consequence be deprived of citizenship without the sanction afforded by judicial proceedings, but will merely be relegated to those remedies, such as habeas corpus, which existed prior to the Nationality Act of 1940. As Judge Byrne pointed out in *Gonzales-Gomez v. Brownell*, *supra* (p. 661):

“* * * The statute does not deprive *any* citizen of his day in court. It merely limits relief under this *particular* statute to specified situations, and those who do not fall within the provisions of the statute are left to the remedies, such as habeas corpus, which existed prior to its enactment.” (Emphasis of the Court.)

Habeas corpus proceedings are sufficient to meet the demands of due process, for even in such proceedings, appellant, if a resident of the United States, would be entitled to an independent judicial determination of his claim to citizenship. (*Ng Fung Ho v. White*, 259 U. S. 276 (1922); *Carmichael v. Delaney*, 170 F. 2d 239 (C. A. 9, 1948).)

V.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court, dismissing appellant's Petition for Declaration of United States Nationality and Declaratory Relief, should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

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Assistant U. S. Attorney,
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No. 14462

United States
Court of Appeals
for the Ninth Circuit

WORCESTER FELT PAD CORPORATION, a
Corporation, Appellant,

vs.

TUCSON AIRPORT AUTHORITY, a Corpora-
tion, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

NOV 26 1954

PAUL P. O'BRIEN,

CLERK

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WORCESTER FELT PAD CORPORATION, a
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In the District Court of the United States for the
District of Arizona

Civil Docket No. 657—Tuc.

WORCESTER FELT PAD CORPORATION, a
Massachusetts Corporation, Plaintiff,

vs.

TUCSON AIRPORT AUTHORITY, an Arizona
Corporation, Defendant.

FILINGS—PROCEEDINGS

1952

Apr. 5—File Complaint.

Apr. 5—Issue summons.

Apr. 5—File summons ret'd showing service on
deft's. statutory agent, B. G. Thompson,
on 4/9/52.

Apr. 28—File defendant's answer.

May 6—File Plaintiff's Demand for Jury Trial.

July 7—File Deposition of Robert W. F. Schmidt.

Aug. 25—On for trial setting. Clampitt pres. for
pltf.; Evans pres. for deft. Clampitt
moves for pre-trial conference. Ent. order
setting for trial Jan. 6, 1953, at ten a.m.
subject to pre-trial conference herein.

Dec. 15—File Notice of Taking Deposition.

Dec. 15—File Motion to Produce.

Dec. 15—File Notice of Motion for 12/22/52 at 2:00
p.m.

1952

Dec. 22—On stipulation of counsel, Order trial setting for Jan. 6, 1953 be vacated and Order this case reset for trial Tues. March 31, 1953 at 10 a.m.; further Order deft's Motion to produce be stricken from calendar with provision that said motion may be called up by either party at any time in the future upon three days written notice to the other party.

1953

Mar. 19—File Stipulation and form of order to vacate trial setting and reset on 9/22/53.

Mar. 20—Ent and file Order setting case for trial on Sept. 22, 1953 with a jury, pursuant to stip. therefor.

July 1—Order trial setting on Sept. 22, 1953 be vacated; further Order case set for trial on Nov. 17, 1953 at 10 a.m. with a jury.

Nov. 2—On stip. of counsel, order vacate trial setting Nov. 17, 1953, and order re-set for trial with a jury Dec. 8, 1953, at 10 a.m. Fur. order set for pre-trial conference Nov. 30, 1953, at 2 p.m.

Nov. 30—On for pre-trial conference. Clampitt pres. for pltf.; Evans present for deft. Pre-trial conference had. Order mo. to produce cont. for hearing to 12/4/53, at 9:00 a.m.

Dec. 7—File praecipe for subpoena for James L. Pattillo.

Dec. 7—Issue subpoena for James L. Pattillo.

1953

Dec. 8—File subpoena to Col. Pattillo ret'd exec. 12/7/53 at Grand Central Aircraft, Tucson, Ariz.

Dec. 8—File deposition of Julius E. Brauer.

Dec. 8—On for trial. C. Wayne Clampitt and Arthur Cutler pres. for pltf.; B. G. Thompson and Richard Evans pres. for deft. Both sides announce ready. Exam. of jurors on voir dire. Jury 12 persons empaneled and sworn. Order exc. remaining jurors until further order. Ent. proceedings of trial. Mo. Royston Ass't U. S. Atty, Order record show presence of said Asst. U. S. Atty. as counsel for witness Lt. Col. James L. Pattillo. Order jury excused to 12/9/53 at 10 a.m. and counsel excused to 12/9/53 at 9:30 a.m.

Dec. 8—File Jury List.

Dec. 9—On for fur. trial. Clampitt and Cutler pres. for pltf.; Thompson and Evans for deft. All jurors present. Evans files motion to amend answer, copy served on opposing counsel. Counsel, Cutler, represents that total damages claimed by plaintiff herein amounts to \$135,280.00. Ent. fur. proceedings of trial. In absence of jury counsel for deft. argues motion to amend answer; counsel for pltf. argues same. Order grant motion to amend and order

1953

Dec. 9 amend answer. Plaintiff rests. In absence (Contd.) of jury, Evans moves the Court to instruct the jury to return a verdict in favor of deft. upon grounds pltf. has failed to prove material allegations contained in complaint. Ruling reserved until all evidence in. Ent. fur. proceedings of trial. Deft. rests. Both sides rest. In absence of jury, Evans moves for an order from Court instructing the jury to return a verdict in favor of deft. for reason pltf. has failed to prove allegations of complaint and on additional ground that evidence shows that plaintiff company is a company organized in the State of Massachusetts and never authorized to do business in State of Arizona. Mo. argued by resp. counsel. Court states that will grant mo. for directed verdict. At 4:37 p.m., jury return into open Court and is presented form of verdict. Verdict signed, read and recorded. Jury discharged and excused to fur. order. Mo. Counsel for deft., order judgment in accordance with verdict entered and that plaintiff take nothing by its complaint.

Dec. 9—File Motion to Amend Answer.

Dec. 9—Enter and file verdict for the defendant, Tucson Airport Authority, and against the plaintiff, Worcester Felt Pad Corporation.

1953

Dec. 9—Enter judgment on the verdict for the defendant Tucson Airport Authority, and against the plaintiff, Worcester Felt Pad Corporation and that plaintiff take nothing by its complaint herein.

Dec. 9—File Deft's Praecipe for Subpoena.

Dec. 9—File Subpoena to Ernest A. Sayre.

Dec. 19—File Plaintiff's Motion for a New Trial

Dec. 24—File Deft's Mo. to Strike Mo. for New Trial.

1954

Jan. 4—C. Wayne Clampitt, Esq. pres. for pltf.; Richard Evans, Esq., pres. for deft.; Pltf's Mo. for New Trial and deft's Mo. to Strike Motion for new trial for hearing; Order deny deft's Motion to Strike Motion for New Trial and Order cont. hearing on pltf's Mo. for a New Trial to Jan. 18, 1954 at 2 p.m. Court directs pltf. file with Court and serve upon counsel for deft. within one week memorandum of authorities on which pltf. intends to rely.

Jan. 11—Order cont. pltf's motion for new trial for hearing to Mon. Jan. 25, 1954 at 2 p.m.

Jan. 11—Mail notice to counsel.

Jan. 11—File Pltf's Memorandum of Points and Authorities on Motion for New Trial.

Jan. 22—File deft's Memorandum in Opposition to Pltf's Motion for a New Trial.

1954

Jan. 25—Pltf's Mo. for new trial for hearing.
Clampitt pres. for pltf. Richard Evans
pres. for deft. On stip. of counsel Motion
submitted on memoranda and taken under
advisement by Court.

Mar. 24—Order pltf's Motion for New Trial be
denied.

Mar. 24—Mail notice to counsel.

Apr. 22—File Notice of Appeal.

Apr. 22—File Personal Bond on Appeal secured by
\$250.00 cash.

Apr. 30—File Stipulation for Substitution of Ap-
peal Bond.

Apr. 30—Enter and file Order substituting surety
bond for cash bond.

Apr. 30—File Bond for Costs on Appeal in sum of
\$250.00 with U. S. Fidelity & Guaranty
Co.

May 27—File Stipulation of Counsel to Extend
Time to Docket Appeal.

May 28—Ent. and file Order extending time to File
Record and docket appeal to Aug. 2, 1954
(doc. 6/1/54 at Tuc.)

July 19—File Stipulation Designating Record on
Appeal.

July 23—File Reporter's Transcript of Proceed-
ings (Unsigned)

July 27—File Reporter's Transcript of Proceed-
ings.

1954

July 29—Fwd. Record on Appeal to Clerk of Court of Appeals, San Francisco, California.

July 29—Mail copies of letter of transmittal of record to Court of Appeals and Clerk's Certificate on Record on Appeal to counsel.

[Title of District Court and Cause.]

COMPLAINT

Comes now the above named Plaintiff by its attorney, C. Wayne Clampitt and alleges:

I.

The Plaintiff is a corporation organized under the laws of and a citizen of the State of Massachusetts and sues the Defendant, a corporation organized under the laws of and a citizen of the State of Arizona.

II.

This is a suit on a written contract and the amount in controversy exceeds the sum of Two Hundred Thousand Dollars (\$200,000.00) exclusive of costs.

III.

That on, to-wit: the 1st day of March, 1949, the Plaintiff and Defendant entered into a written lease, copy of which is attached hereto and marked "Exhibit A" and prayed to be read as a part hereof, under which the Defendant leased to the Plaintiff a portion of an airplane hangar situate on the

Tucson Municipal Airport near the City of Tucson and in Pima County, Arizona at a rental of One Hundred Dollars (\$100.00) a month for a term of three years and granting the Plaintiff three options to extend the original term so that at Plaintiff's sole option the lease term could be twelve years in all, and the Defendant reserved unto it only the right to increase the original monthly rental to a maximum of \$125.00 a month during the last six years of said twelve year maximum term.

IV.

That under provision (4) of said lease either Plaintiff or Defendant might terminate this lease in the event that either party was deprived of its use of the leased premises by governmental action in the event of a national emergency and the Plaintiff was required to remove all its property within thirty days of termination or forfeit the same to the Defendant at its option.

V.

That upon the 18th day of October, 1951, the Defendant mailed the Plaintiff by registered mail a written notice as provided in said lease that the Federal Government required Plaintiff's leased premises, under the needs of a national emergency, and that the Defendant was therefore terminating Plaintiff's lease on October 31, 1951 and required Plaintiff to vacate its leased premises in their entirety within 30 days thereafter.

VI.

That the Federal Government neither at the time of said notice, nor at any time before or since, ever required Plaintiff's leased premises, as the Defendant then and there well knew, but instead, the Grand Central Aircraft Company, a civilian private corporation did wish to lease Plaintiff's leased premises from the Defendant, and was ready, willing and able to pay a greatly increased monthly rental for the same, as the Defendant then and there well knew.

VII.

That the Plaintiff, relying upon said notice, and having no knowledge of the matters alleged in Paragraph VI above, surrendered its lease and vacated its leased premises within the required time, all at great cost and expense and suffered and will continue to suffer large monetary losses by reason of the same.

VIII.

That on or about the time Plaintiff vacated said premises, as Plaintiff is informed and believes and therefore alleges, the Defendant leased unto the said Grand Central Aircraft Company the same premises at a monthly rental of approximately \$1,400.00, the exact term, and true description of the premises leased being not known to Plaintiff, but ever since that time, up to and including the date this action is filed, said company has been occupying said premises and paying, as Plaintiff is informed and believes and therefore alleges, said monthly rental. That the difference between the maximum rental

that Plaintiff could have been required to pay for said premises for the remaining 9 years and 7 months of Plaintiff's lease and the rental per month the Defendant is now receiving is One Hundred Forty-Seven Thousand, Seven Hundred Dollars (\$147,700.00).

IX.

That by reason of the loss of Plaintiff's Western plant, Plaintiff has been and is forced to grant a 5% freight allowance upon all orders in the Western part of the United States resulting in an annual loss to it of approximately \$5,000.00, or a total loss for the remaining term of Plaintiff's lease of Forty-Seven Thousand Nine Hundred Sixteen and 62/100 Dollars (\$47,916.62).

X.

That by reason of the Defendant's wrongful termination of said lease, Plaintiff sustained financial losses directly resulting from the closing of its place of business of Eleven Thousand One Hundred and Eighty Dollars (\$11,180.00).

Wherefore Plaintiff brings this suit and claims judgment against the Defendant in the amount of Two Hundred Six Thousand, Seven Hundred Ninety Six and 62/100, (\$206,796.62), Dollars, together with its costs of suit.

/s/ C. WAYNE CLAMPITT,
Attorney for the Plaintiff

EXHIBIT A

LEASE AGREEMENT

This agreement, made and entered into this 1st day of March A.D., 1949, by and between Tucson Airport Authority, an Arizona Corporation, hereinafter called the lessor, and Worcester Felt Pad Corporation, a Massachusetts corporation, hereinafter called the Lessee;

Witnesseth:

Whereas the Lessor has in its custody a building identified as hangar No. Two (No. 2) situate on the west side of Tucson Municipal Airport between hangars No. One (No. 1) and No. Three (No. 3), and

Whereas the Lessee desires to conduct a business of light manufacturing and also the assembling, packaging, selling and distributing of plastic games and novelties, all as a wholesale enterprise, said business not to be in substantial competition with any retail business located on the Tucson Municipal Airport.

Now therefore, Lessor does by these presents lease to Lessee that portion of the second floor of the west "leanto" of said Hangar No. 2, including one stairway, two toilets and one freight elevator, situate between columns one (1) and twenty (20) containing Twelve Thousand Nine Hundred Twenty (12,920) square feet, more or less; together with the right of ingress and egress from the exterior of the hangar to said stairway and elevator, said right to be sufficient for the unloading of one transport type truck at any one time.

Exhibit A—(Continued)

To have and to hold the same to the said Lessee from the first day of June, 1949, to the first day of June, 1952; and said Lessee in consideration of such leasing covenants and agrees to pay Lessor as rent for the same the sum of One Hundred Dollars (\$100.00) per month in advance, payable upon the first day of June, 1949 and the first day of each month thereafter during the term hereof. It is expressly agreed Lessee shall have the right to enter, use, and occupy said premises from the date of this agreement to the first day of June, 1949, without paying any rent except that the Lessee agrees to pay for all utility services used during said period. The said Lessee shall have the option to extend this lease for a further period of three years upon the same terms, covenants and conditions hereinbefore and hereinafter set out, and the Lessee shall have a further option to extend this lease for a further period of three years in the event it exercises the first option, upon the same terms, covenants and conditions hereinbefore and hereinafter set out except that the Lessor may increase the monthly rental a maximum amount of twenty-five per cent (25%) above that prescribed in this lease. Lessee shall have the option to extend for a further period of three years, the term of this lease, provided Lessee has exercised its prior options, upon the same terms, covenants and conditions hereinbefore and hereinafter set out except the Lessor may fix the monthly rental a maximum amount of twenty five per cent (25%) above the original monthly

Exhibit A—(Continued)

rental prescribed in this lease. All options shall be exercised by the Lessee by notice in writing served upon the Lessor by the Lessee not later than thirty (30) days prior to the beginning of the particular three year period sought to be extended.

(1) The Lessee agrees to assume all costs of remodeling, rewiring and reconditioning the demised premises as incidental to initial occupancy, and to bear all costs of electric energy, gas, air conditioning and water consumed by him during all occupancy. (The Lessee agrees that all construction work done upon the demised premises shall be in compliance with the building code of the City of Tucson and the construction code of the Fire Insurance Underwriters.)

(2) The Lessee agrees to save the Lessor harmless from all claims for damage, injury, and distress, and to carry insurance in amounts sufficient to protect the interests of both.

(3) The Lessee shall have the right, in common with others authorized to do so, to use common areas of the airport, including parking areas, roadways and public conveniences in general.

(4) The Lessee recognizes the right of the federal, state and local governments to restrict or limit the use of the airport by the City of Tucson and/or Tucson Airport Authority in the event of national emergency, and in the event of such action depriving either the Lessee or the Lessor of normal enjoyment, agrees to a suspension or termination of the lease at the option of either the Lessor or the

Exhibit A—(Continued)

Lessee. In the event of termination, the Lessee shall have the right to remove all of his property within thirty days after termination, but all items remaining after thirty days may, at the Lessor's option, become its sole property.

(5) The Lessor reserves the right and privilege of moving all of the Lessee's operations as conducted within the premises, including right of ingress and egress, the stairway, the toilets, and/or the freight elevator, to a comparable floor space and location if such action is necessary to facilitate the leasing of an area larger than that let to the lessee. The Lessor agrees that such action will not be undertaken without thirty (30) days notice in writing and that all costs of such a move, including proven losses in revenue resulting directly from said move, shall be borne by the Lessor. The Lessor agrees that no such action shall result in a severance or isolation of any portion of the Lessee's or Sub-Lessee's operations unless agreed to in writing by the Lessee.

(6) It is hereby agreed that no coin-operated vending machine or coin-operated device for amusement purposes may be placed upon the demised premises by the Lessee without the written consent of the Lessor, and the Lessor reserves the right to license such machines to third parties in any portion of the demised premises customarily frequented by the public in contra-distinction to areas commonly frequented by the Lessee, its employees, servants and agents.

Exhibit A—(Continued)

(7) The Lessor shall be responsible only for normal exterior maintenance of the demised premises, and the Lessee shall be responsible for regular interior maintenance including cleaning of area designated for ingress and egress, the stairway, toilets, freight elevator, disposal of waste and rubbish, and compliance with all rules established by the Lessor for mutual well-being and safety. The Lessee agrees that the demised premises shall be available for fire prevention and safe practice inspection by the Lessor or its agents during all business hours.

(8) It is understood and agreed that the Lessee plans on assigning a portion or all of this lease to one or more other corporations and Lessor agrees to approve any such assignment or sub-letting provided that the said assignee or sub-tenant is reasonably satisfactory to the Lessor, but no such assignment shall operate to relieve the Lessee herein from its obligations and duties under the terms of this lease.

(9) All notices, demands and other instruments in writing which the parties may be required to serve or may desire to serve upon each other shall be served as follows, to-wit:

Service upon Lessee shall be by mailing a copy thereof by registered mail, postage prepaid, to the Lessee at its place of business at Tucson Municipal Airport and by mailing a copy thereof by registered mail, postage prepaid, to the Lessee at its place of business at No. 11 Brackett Court, Worcester, Massachusetts.

Exhibit A—(Continued)

Service upon Lessor shall be by mailing a copy thereof by registered mail, postage prepaid, to the Manager of Tucson Airport Authority at the Tucson Municipal Airport, Tucson, Arizona, and a copy thereof to C. Wayne Clampitt, Statutory Agent of said corporation, at 37 North Church Street, Tucson, Arizona.

Lessor and Lessee may from time to time designate another address for service of said notices in correction or to substitute for those hereinabove set out.

In witness whereof the Lessor has caused this instrument to be executed by its duly authorized Manager and the Lessee has caused this instrument to be executed by its duly authorized President, all on the day and year first above written.

TUCSON AIRPORT AUTHORITY,
Lessor

By ROBERT F. SCHMIDT,
Manager

WORCESTER FELT PAD
CORPORATION, Lessee

By JULIUS E. BRAUER,
President.

Permission is hereby given to the lessee to assign a portion of the above described premises to Tech-Toys, Inc.

TUCSON AIRPORT AUTHORITY,
Lessor

/s/ By ROBERT F. SCHMIDT,
Manager.

[Endorsed]: Filed April 5, 1952.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and for its answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

1. Admits the allegations of paragraph I of said complaint.

2. Admits that this is an action brought upon a written contract.

3. Admits the allegations contained in paragraph III of the complaint.

4. In answer to paragraph IV of said complaint, defendant alleges that paragraph (4) of the lease referred to in said complaint is as set forth in the copy of the lease which is appended to, marked Exhibit A, and made a part of plaintiff's complaint.

5. Admits the allegations contained in paragraph V of plaintiff's complaint.

6. Defendant denies the allegations of paragraph VI of the complaint, and in answer thereto alleges that defendant terminated the lease mentioned in plaintiff's complaint under and pursuant to the authority and right retained by defendant to so terminate said lease by virtue of the provisions of paragraph (4) of said lease.

7. In answer to paragraph VII defendant admits that plaintiff surrendered the leased premises and vacated the same prior to December 31, 1951. Defendant has insufficient knowledge on which to either admit or deny the remaining allegations of

said paragraph and calls for strict proof of the same.

8. In answer to the allegations contained in paragraph VIII defendant admits that Grand Central Aircraft Company has been occupying the space heretofore occupied by the plaintiff since February, 1952, upon a month to month occupancy, and that it has paid to defendant, monthly, during the period of its occupancy, the sum of \$299.20, on account of the use and occupancy of said premises by Grand Central Aircraft Company. Defendant further alleges that the total rental value of the premises heretofore leased by plaintiff, for the period of nine years, seven months, from the date that plaintiff vacated said premises, will not exceed \$200 per month.

9. In answer to the allegations contained in paragraph IX of said complaint defendant is without knowledge or information sufficient to either admit or deny the allegations contained in said paragraph, and therefore calls for strict proof of the same.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of said complaint and therefore calls for strict proof of the same.

11. Defendant denies, generally and specifically, each and every allegation contained in said complaint not hereinbefore admitted.

Wherefore, defendant prays that plaintiff take

nothing by its said complaint, that the same be dismissed, and for its costs.

KNAPP, BOYLE, BILBY &
THOMPSON,
/s/ B. G. THOMPSON,
Attorneys for Defendant

[Endorsed]: Filed April 28, 1952.

[Title of District Court and Cause.]

MOTION TO PRODUCE

Comes Now the defendant, Tucson Airport Authority, an Arizona corporation, in the above entitled action, by its attorneys, Knapp, Boyle, Bilby & Thompson, and moves the court for an order directing the plaintiff to produce and permit the inspection and copying or photographing by or on behalf of the defendant of the books and records of the plaintiff corporation for the period from March 1, 1949, through November 30, 1952, showing the business done by the plaintiff from its Tucson Plant prior to its closing said Tucson Plant, and showing the orders filled by it in the western part of the United States subsequent to its closing the Tucson Plant and through November 30, 1952, and showing all financial losses or expenses incurred from the closing of its place of business in Tucson, Arizona.

This motion is made pursuant to Rule 34 of the Federal Rules of Civil Procedure and is based upon

the pleadings on file in the above entitled action and the affidavit of Richard B. Evans, attached hereto and made a part hereof.

Dated this 13th day of December, 1952.

KNAPP, BOYLE, BILBY &
THOMPSON,
/s/ RICHARD B. EVANS,
Attorneys for Defendant

AFFIDAVIT

State of Arizona,
County of Pima—ss.

Richard B. Evans, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, Tucson Airport Authority, an Arizona corporation, defendant in the above entitled action; that he makes this affidavit on its behalf and in support of its motion to produce.

That the records of the plaintiff corporation are material to the above entitled action for the reason that the plaintiff is claiming damages from the defendant upon the grounds that its expenses of operation have been increased as a result of the alleged breach of lease by the defendant, and upon the grounds that they have suffered financial expense resulting from the closing of its place of business in Tucson, Arizona as a result of the alleged breach of lease by the defendant corporation.

That the defendant has no manner available to it for obtaining the information sought by this mo-

tion, other than by inspection of the pertinent books and records of the plaintiff.

/s/ RICHARD B. EVANS,

Subscribed and sworn to before me this 13th day of December, 1952.

[Seal] /s/ WINIFRED TRUSKY,
Notary Public

[Endorsed]: Filed December 15, 1952.

[Title of District Court and Cause.]

MINUTE ENTRY OF TUESDAY, DEC. 8, 1953

Honorable James A. Walsh, United States District Judge, presiding.

This case comes on regularly for trial this day. C. Wayne Clampitt, Esq., and Arthur Cutler, Esq., are present for the plaintiff. B. G. Thompson, Esq., and Richard Evans, Esq., appear on behalf of the defendant. Fred Baker is present as the official court reporter.

Both sides announce ready for trial.

Examination of jurors on voir dire is now had.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case, and

It Is Ordered that all jurors not empaneled in the trial of this case be excused until further order.

Counsel for the plaintiff now states the plaintiff's case to the jury. Thereafter, counsel for the defend-

ant makes statement to the jury on behalf of the defendant.

Plaintiff's Case:

Lt. Colonel James L. Pattillo is now called as a witness for the plaintiff.

On motion of Robert Royston, Esquire, Assistant U. S. Attorney,

It Is Ordered that the record show the presence of said Assistant U. S. Attorney as counsel for the witness Lt. Col. James L. Pattillo.

Lt. Col. James L. Pattillo is now sworn and examined on behalf of the plaintiff.

And thereupon, at 11:55 o'clock a.m., It Is Ordered that the further trial of this case be continued until 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, is excused.

The Jury having withdrawn from the Courtroom, counsel for all parties being present, counsel for the plaintiff now argues the admissibility of testimony.

Thereupon, It Is Ordered that this court stand at recess until 1:30 o'clock p.m., this date.

Subsequently, at 1:30 o'clock p.m., the Jury, and all members thereof, and all counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Lt. Colonel James L. Pattillo, heretofore sworn, is now recalled and further examined on behalf of the plaintiff.

Robert W. F. Schmidt is now sworn and examined on behalf of the plaintiff.

At 1:40 o'clock p.m., the Jury, being first duly admonished, is excused from the Court room. In the absence of the Jury, all counsel being present, counsel for the plaintiff offers proof of his intended procedure.

At 1:55 o'clock p.m., the Jury return into the Courtroom and further proceedings of trial are had as follows:

Robert W. F. Schmidt, heretofore sworn, is now recalled and further examined on behalf of the plaintiff.

The following plaintiff's exhibits are now admitted in evidence:

No. 5, photostatic copy of letter dated September 26, 1951, to the Tucson Airport Authority from James L. Pattillo, Lt. Colonel, USAF.

No. 2, letter dated October 18, 1951, to Julius Brauer from R. W. F. Schmidt.

Plaintiff's exhibits No. 5 and No. 2 are now read to the Jury.

The following plaintiff's exhibits are now admitted in evidence:

No. 8, copy of letter dated October 4, 1951, to Lt. Colonel James L. Pattillo, Lt. Colonel, USAF, from R. W. F. Schmidt.

No. 9, copy of letter dated October 10, 1951, to Tucson Airport Authority from James L. Pattillo, Lt. Colonel, USAF.

The following witnesses are now sworn and ex-

amined on behalf of the plaintiff: J. Leslie Hansen, Mark H. Klafter, Julius Brauer.

Thereupon, at 4:30 o'clock p.m., It Is Ordered that the further trial of this case be continued until Wednesday, December 9, 1953, at 10:00 o'clock a.m., to which time the Jury, being first duly admonished by the Court, and parties are excused. It Is Ordered that counsel be excused to 9:30 o'clock a.m., Wednesday, December 9, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY,
DECEMBER 9, 1953

Honorable James A. Walsh, United States District Judge, presiding.

The Jury, and all members thereof, and counsel for respective parties are present pursuant to recess, and further proceedings of trial are had as follows:

Counsel for the defendant now files motion to amend defendant's answer, a copy of which is served on counsel for the plaintiff. Counsel for the plaintiff represents that the plaintiff is now asking solely the difference between the real value and lease price during the period of the lease yet to run and requests defendant's concession on figures presented in support thereof. Further proceedings of trial are now had as follows:

Plaintiff's Case Continued:

Julius Brauer, heretofore sworn, is now recalled and further examined on behalf of the plaintiff.

Robert J. Alpert is now sworn and examined on behalf of the plaintiff.

Lt. Colonel James L. Pattillo, heretofore sworn, is now recalled and further examined on behalf of the plaintiff.

At 11:00 o'clock a.m., the jury, being first duly admonished, is excused from the Courtroom. In the absence of the Jury, all counsel being present, counsel for the plaintiff makes an offer of proof through the testimony of Lt. Colonel Pattillo, and

It Is Ordered that said offer of proof be and it is rejected.

Hearing is now had on defendant's Motion to Amend Answer. Said motion is duly argued by respective counsel, and

It Is Ordered that defendant's Motion to Amend Answer be and it is granted.

At 11:20 o'clock a.m., the Jury return into the Courtroom and further proceedings of trial are had as follows:

The following witnesses, heretofore sworn, are now recalled and further examined: Lt. Colonel James L. Pattillo, Robert J. Alpert.

Whereupon, the plaintiff rests.

Thereupon, at 11:30 o'clock a.m., It Is Ordered that the further trial of this case be continued until 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, is excused.

The Jury having withdrawn from the Courtroom,

counsel for respective parties being present, counsel for the defendant now moves for a directed verdict in favor of the defendant upon the grounds that the plaintiff has failed to prove material allegations contained in the complaint; that the plaintiff has failed to prove allegations of actionable fraud; that plaintiff has failed to prove allegations of wrongful eviction.

Said motion is now duly argued by respective counsel.

The Court reserves ruling on said motion until all the evidence has been presented.

Thereupon, counsel are excused until 1:30 o'clock p.m., this date.

Subsequently, at 1:30 o'clock p.m., the Jury, and all members thereof, and all counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendant's Case:

Defendant's Exhibit D, Certificate of Arizona Corporation Commission, is now admitted in evidence.

The following witnesses, heretofore sworn, are now called and examined on behalf of the defendant: Robert J. Alpert, Julius Brauer.

Plaintiff's Exhibit No. 1, Lease Agreement, is now admitted in evidence.

Robert W. F. Schmidt, heretofore sworn, is now called and examined on behalf of the defendant.

The following witnesses are now sworn and examined on behalf of the defendant: Fred Stofft, Ernest A. Sayre.

The following defendant's exhibits are now admitted in evidence:

E, Signature card of Worcester Felt Pad Corporation. F, Twelve Valley National Bank ledger sheets.

Robert J. Alpert, heretofore sworn, is now recalled and further examined on behalf of the defendant.

The following defendant's exhibits are now admitted in evidence:

G, Photostatic copy of letter dated October 9, 1951 to Mr. R. F. W. Schmidt from H. A. Hook.

H, Copy of letter dated October 6, 1951 to Mr. H. A. Hook from R. W. F. Schmidt.

And the defendant rests.

Both sides rest.

At 4:00 o'clock p.m., the Jury, being first duly admonished, is excused from the Courtroom. In the absence of the Jury, all counsel being present, counsel for the defendant now moves for a directed verdict in favor of the defendant for the reason that plaintiff has failed to prove allegations of the complaint and on additional ground that evidence shows that plaintiff company is a company organized in the State of Massachusetts and never authorized to do business in the State of Arizona.

Said motion is duly argued by respective counsel, and

It Is Ordered that defendant's Motion for a directed verdict be and it is granted.

Thereupon, at 4:37 o'clock p.m., the Jury return into the Courtroom and are instructed to return a verdict in favor of the defendant. Whereupon, the

Foreman signs and presents the following verdict:

Verdict

[Title of Cause.]

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant, Tucson Airport Authority, and against the plaintiff, Worcester Felt Pad Corporation.

December 9, 1953.

John J. Kacergis, Jr., Foreman

The verdict is read as recorded and no poll being desired by either side, the Jury is discharged from the further consideration of this case and excused until further order.

On motion of counsel for the defendant,

It Is Ordered that judgment be entered in accordance with the verdict in favor of the defendant and that plaintiff take nothing by his Complaint herein.

[Title of District Court and Cause.]

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant, Tucson Airport Authority, and against the plaintiff, Worcester Felt Pad Corporation.

December 9, 1953.

/s/ JOHN J. KACERGIS, JR.,
Foreman

[Endorsed]: Filed December 9, 1953.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the plaintiff, Worcester Felt Pad Corporation, in the above entitled action, by its attorney C. Wayne Clampitt, and moves the court for an order setting aside the verdict and the judgment and granting a new trial upon the following ground:

1. The court erred in directing the jury to return a verdict in favor of the defendant.

Plaintiff requests that the court set a day and time for the hearing of the above motion.

/s/ C. WAYNE CLAMPITT,
Attorney for Plaintiff

[Endorsed]: Filed December 19, 1953.

[Title of District Court and Cause.]

MINUTE ENTRY OF WEDNESDAY
MARCH 24, 1954

Honorable James A. Walsh, United States District Judge, presiding.

Since the making of the lease sued on herein contemplated and was promptly followed by plaintiff's full scale entry upon the conduct of a manufacturing, sales and distribution business in Arizona, without plaintiff's ever having qualified to do business in Arizona, it is the court's view that the law

of Arizona makes void all acts and business done by the plaintiff in Arizona, including the making of the lease. Sec. 53-802, Arizona Code, Ann. 1939; Restatement, Conflict of Laws, Sec. 167, p. 244, Comment a; Lowenmeyer vs. National Lumber Co., 125 N.E. 67; Martin vs. Banker's Trust Co., 18 Ariz. 55, 63, 156 P. 87, 90; National Union Indemnity Co. vs. Bruce Bros., Inc., 44 Ariz. 454, 38 P. 2d 648; Scott vs. Bruce Bros., Inc., 44 Ariz. 469, 38 P. 2d 654.

It Is Ordered, therefore, that plaintiff's motion for a new trial is denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Tucson Airport Authority, an Arizona corporation, and Knapp, Boyle, Bilby & Thompson, and Richard B. Evans, its attorneys:

Notice Is Hereby Given that Worcester Felt Pad Corporation, the plaintiff above named, appeals to the Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 9th day of December, 1953. (Plaintiff's Motion for a new trial having been denied by order of court March 24, 1954.)

Dated April 22, 1954.

C. WAYNE CLAMPITT,
A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,
Attorneys for Plaintiff

[Endorsed]: Filed April 22, 1954.

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD
ON APPEAL

It Is Hereby Stipulated by the parties that the record on appeal shall consist of the complete record and all the proceedings and evidence in the action, to-wit:

1. The Complaint.
2. The Answer.
3. All Motions and Orders before trial.
4. The entire Transcript of Testimony.
5. All exhibits.
6. Defendant's Motion for Directed Verdict.
7. Court's Direction of Verdict.
8. Plaintiff's Motion for new trial.
9. Order denying new trial.
10. Judgment.
11. Notice of Appeal.
12. This designation.
13. Journal entries.
14. All other proper parts of the Clerk's Record.

C. WAYNE CLAMPITT,
A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,
Attorneys for Plaintiff-Appellant

KNAPP, BOYLE, BILBY &
THOMPSON,
RICHARD B. EVANS,
/s/ By B. G. THOMPSON,
Attorneys for Defendant-Appellee

[Endorsed]: Filed July 19, 1954.

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME OF APPEAL

The above named plaintiff having duly filed its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, and

The attorneys for the above named plaintiff and defendant contemplate by stipulation to be made agreeing upon the designation of the contents of the record on said appeal and thereby simplify and clarify the points in said appeal they deem important for review, and whereas

There is insufficient time now remaining for this stipulation to be agreed upon so that the Clerk may complete the preparation of the record on appeal within the period of forty (40) days, all without fault of either party or said Clerk,

Now Therefore It Is Hereby Stipulated that the plaintiff appellant make ex-parte application forthwith for an order of the District Court extending the time within which the record on appeal may

be filed, and the appeal docketed in said Court of Appeals to and including August 2, 1954.

C. WAYNE CLAMPITT,
A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,
Attorneys for Appellant
KNAPP, BOYLE, BILBY &
THOMPSON,

RICHARD B. EVANS,
/s/ By WILLIAM O. SCANLAND,
Attorneys for Appellee

[Endorsed]: Filed May 27, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It is by the Court this 28th day of May, 1954

Ordered: That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit in the above entitled action be, and it hereby is, extended to and including August 2, 1954.

/s/ JAMES A. WALSH,
Judge

Approved as to form:

KNAPP, BOYLE, BILBY & THOMPSON,
RICHARD B. EVANS,

/s/ WILLIAM O. SCANLAND,
Attorneys for Defendant-Appellee

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Worcester Felt Pad Corporation, a Massachusetts Corporation, Plaintiff, vs. Tucson Airport Authority, an Arizona Corporation, Defendant, numbered Civil 657 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the civil docket entries and minute entries are true and correct copies of the originals thereof remaining in my office in the City of Tucson, State and District aforesaid.

I further certify that said original documents, and said copies of the civil docket entries and of the minute entries, constitute the record on appeal in said case, as designated in the Stipulation Designating Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to-wit:

1. Civil Docket Entries, including Clerk's notation of entry of Judgment.

2. Complaint.
3. Answer.
4. Defendant's Motion to Produce.
5. Minute entries of December 8 and 9, 1953, proceedings of trial, including Court's direction of verdict.
6. Verdict.
7. Plaintiff's Exhibits 1, 2, 5, 8 and 9 in evidence.
8. Plaintiff's Exhibits 3, 4, 10 and 11 marked for identification.
9. Defendant's Exhibits D, E, F, G and H in evidence.
10. Defendant's Exhibit A marked for identification.
11. Plaintiff's Motion for New Trial.
12. Minute entry of March 24, 1954 (Order denying Motion for New Trial).
13. Plaintiff's Notice of Appeal.
14. Stipulation Designating Record on Appeal.
15. Reporter's Transcript, filed July 27, 1954.
16. Stipulation to Extend Time of Appeal.
17. Order Extending Time to File Record and Docket Appeal.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$5.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Prescott, Arizona, this 29th day of July, 1954.

[Seal] /s/ WM. H. LOVELESS, Clerk

In the United States District Court for the
District of Arizona

No. Civil 657—Tucson

WORCESTER FELT PAD CORPORATION, a
Massachusetts Corporation, Plaintiff,

vs.

TUCSON AIRPORT AUTHORITY, an Arizona
Corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Appearances: Mr. A. S. Cutler and Mr. C. Wayne Clampitt, attorneys for plaintiff. Messrs. Knapp, Boyle, Bilby & Thompson, by Mr. B. G. Thompson and Mr. Richard Evans, for the defendant.

The above entitled case came up for trial before the Honorable James A. Walsh, Judge, and a Jury, on the 8th day of December, 1953, at Tucson, Arizona, and the following proceedings were had, to-wit: [1*]

The Clerk: Worcester Felt Pad Corporation, a Massachusetts corporation, plaintiff vs. Tucson Airport Authority, an Arizona corporation, defendant, Civil No. 657.

The Court: Is the plaintiff ready?

Mr. Clampitt: Yes, sir.

The Court: The defendant ready?

Mr. Thompson: Yes, sir, your Honor.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: The clerk will call the names of eighteen jurors. Ladies and Gentlemen, as your names are called will you come forward and take the seats which the bailiff will indicate to you.

(Jury panel sworn.)

The Court: Ladies and Gentlemen, the case that is about to go to trial today is a civil action. It is an action for damages or instituted by the Worcester Felt Pad Corporation, which is a Massachusetts corporation, that is, a corporation organized under the laws of the State of Massachusetts, and the Worcester Felt Pad Corporation bringing the action is called the plaintiff in the action. The action is brought against the Tucson Airport Authority, which is an Arizona corporation, a corporation organized under the laws of the State of Arizona. The Tucson Airport Authority is styled in the action the defendant. And, as I say, the plaintiff Worcester Felt Pad Corporation brings the action, sues the Tucson Airport Authority for damages. [2]

Very briefly what the case is about is this:

The plaintiff, the Worcester Felt Pad Corporation, says that back in the year 1949 it leased from the Tucson Airport Authority certain real property and premises for business purposes, that the lease was for a period of three years at a certain monthly rental, and the lease had also had options in it whereby the plaintiff, the Worcester Felt Pad Corporation, could continue in possession of the premises for three additional three year periods. In other words, at the option of the plaintiff, the

Worcester Felt Pad Corporation, it might extend its lease for nine additional years beyond the three year term.

The plaintiff also states and sets out that the lease contained a provision which provided that the lessee, that is the Worcester Felt Pad Corporation, recognized the right of the federal, state and local governments to restrict and limit the use of the airport by the Airport Authority, and these leased premises were on the airport, in event of national emergency, and in the event of such action depriving either the Lessee or the Lessor of normal enjoyment, agrees to a suspension or termination of the lease at the option of either the Lessor or the Lessee. They say further during the initial three year term, at a time in the initial three year term the defendant, Tucson Airport Authority, advised them by writing that the Federal Government desired or required the use of the [3] premises which the plaintiff was occupying, and that in truth and in fact the Federal Government didn't require those premises, but there was another private corporation, the Grand Central Corporation, that wanted to rent them for more rent than the plaintiff was paying.

The plaintiff says it had no knowledge of anything other than what the defendant represented to it. In other words, that the Government wanted the premises. So it agreed to a termination of the lease and moved out. It says it claims that by reason of the conduct of the defendant in causing it to terminate its lease under a misstating of the

situation, it lost the value of the lease; it was required to incur additional costs in its operations and had other damages, and asks to recover damages against the defendant.

Those are the claims of the plaintiff that I have been outlining to you. Those are the things the plaintiff claims.

On the other hand, the defendant, the Tucson Airport Authority, says the plaintiff did have a lease and did have the term and provision I have read to you in it, and it did give the plaintiff notice that the Government, the Federal Government, required the occupancy of the premises which the Felt Pad Corporation had been occupying. But it says, the defendant says, that was a fact and that it terminated this lease and retook possession of the premises strictly and only in accordance with the terms of the lease, and for that reason [4] it owes the plaintiff nothing.

Now, that of course does not exhaust all the issues between the parties but that in brief is an outline of the case that is about to be tried, and I have outlined it to you at this time because very shortly the Court will address certain questions to the jurors collectively and when I have finished interrogating counsel will do the same thing and your understanding of the case will be helpful in your ability to answer those questions.

The plaintiff, the Worcester Felt Pad Corporation, is represented in this action by Mr. Wayne Clampitt, an attorney from Tucson, who is the gentleman in the gray coat seated nearest the jury

box; and associated with him is Mr. A. S. Cutler, the gentleman to Mr. Clappitt's right, who is a member of the New York bar. Is that correct, Mr. Cutler?

Mr. Cutler: That is right.

The Court: The defendant, Tucson Airport Authority, is represented in this suit by Mr. B. G. Thompson, who is the gentleman at this table closer to me; by Mr. Richard Evans. Both Mr. Thompson and Mr. Evans are members of the Tucson bar. As I say, at this time the Court will address certain question to the jurors collectively and counsel will undoubtedly have some questions also.

I ask if the jurors' answer, prospective jurors' answer to a particular question would be in the affirmative, in other words, if you would answer any particular question "Yes" please [5] raise your hand so that particular line of inquiry can be pursued further.

I will ask first of all if any prospective juror is employed by either the defendant or the plaintiff. Is there any prospective juror employed by either the Worcester Felt Pad Corporation or Tucson Airport Authority.

Mr. James O. Nabours: Your Honor, I am employed by the City of Tuscon. What relation that has, it is connected, of course, with the Authority in some manner. I don't know what the bearing would be.

The Court: Mr. Nabours, I don't myself, but assuming there is some or there may prove to be connection between the defendant corporation and

the City of Tucson, would that fact influence you or cause you to lean to one side or the other in the case if you were chosen as a juror to try it?

Mr. Nabours: No, sir.

The Court: Could you, regardless of the fact you are employed by the City here, make up a verdict based solely on the evidence you got from the witness stand and the Court's instructions as to the law?

Mr. Nabours: Yes, sir.

The Court: And would you do that fairly and conscientiously if you were chosen to try this case?

Mr. Nabours: I would, sir.

The Court: Was there any other juror that indicated he [6] or she was employed by either the plaintiff or the defendant? Is there any prospective juror a member of whose immediate family is employed by either the plaintiff or the defendant, that is, the Worcester Felt Pad Corporation or Tucson Airport Authority, any member of your immediately family? Has any juror ever in the past been employed by one or the other of these corporations? Have any of you ever had employment with either of the parties to this suit, that is, Worcester Felt Pad Corporation or Tucson Airport Authority? Is there any prospective juror who does now or has in the past had any business relationships with either Worcester Felt Pad Corporation or Tucson Airport Authority? Any of you dealt with either of these corporations in a business way?

In there any juror who to his knowledge is acquainted with any of the managing officers of either

the Airport Authority or Worcester Felt Pad Corporation?

Mr. William S. Nicholas: I think as an ordinary citizen I know all of the Authority personally. I have no business or relationship with them.

The Court: That is a matter of having a social acquaintance?

Mr. Nicholas: Yes, and possibly past business over a long time, but not within several years.

The Court: Mr. Nicholas, would that acquaintanceship, the fact that you may have a social acquaintance with one or [7] more of the officers of the Authority, would that cause you to lean one way or the other in the trial of this case?

Mr. Nicholas: I don't think so. I merely put up my hand because you indicated.

The Court: That is what both Court and Counsel appreciate, Mr. Nicholas. So there will be no uncertainty or misunderstanding, you do not feel that acquaintance would have any bearing or influence you or cause you to lean to one side or the other of the case if you were chosen as a juror to try it?

Mr. Nicholas: I shouldn't think so.

Ruth A. Mayer: I have met Mr. Schmidt a couple of times, that is all.

The Court: I will ask you, Mrs. Mayer, would the fact you have met him at all prejudice you or bias you if you were chosen to try this case?

Mrs. Mayer: No.

The Court: You would, if chosen to try it, try

it fairly and impartially and be fair to both sides of the case?

Mrs. Mayer: Yes.

The Court: Was there any other juror that indicated he or she were acquainted with any of the managing officers of either corporation?

I have identified the counsel in the case, Ladies and Gentlemen, and I will ask if any of the lawyers have ever stood [8] in the relation of attorney to any of you, any of the lawyers in the case ever handled any legal matters for you?

Mr. Eugene R. Heap: Mr. Clampitt has.

The Court: Do you have any business at this time, Mr. Heap, in Mr. Clampitt's hands?

Mr. Heap: No.

The Court: That relationship is one that had been terminated?

Mr. Heap: Yes, sir.

The Court: The business is entirely finished?

Mr. Heap: Yes, sir.

The Court: And the fact that Mr. Clampitt had in the past been your attorney or handled some legal matters for you, would that influence you at all if you were chosen to try this case?

Mr. Heap: No.

The Court: You could and would try it just as fairly and impartially as if you had never met Mr. Clampitt?

Mr. Heap: Yes, sir.

The Court: Very well. Any other juror?

A Juror: I have been on committees with both the gentlemen concerned. I don't think either one

of them acted as my attorney, certainly not in any court case. I have conferred with both.

The Court: That is Mr. Thompson and Mr. Clampitt? [9]

The Juror: Both, mostly as committee work.

The Court: Would that influence you at all?

The Juror: I don't think so, both friends.

The Court: You are friendly with both of them and you would disregard friendship as your oath here required?

The Juror: I would have to be neutral, your Honor.

The Court: I take it probably many members of the jury have a social acquaintance with one or more of the lawyers in the case, local counsel, being of prominence here in Tucson, I am certain many of you have some social acquaintance with one or more of the lawyers or you may do some business with them apart from their representing you as your attorney. As to any jurors as to whom that may be true, that is, jurors who have a social or business acquaintance with any of the lawyers, I will ask if there is any juror in that situation that would be influenced or embarrassed at all by that acquaintance if he or she sat as a juror at the trial of this case? In other words, would that business or social acquaintanceship at all influence you or tend to embarrass you at all if you were chosen to try the case? Is there any prospective juror who has ever been a claimant for damages in a matter growing out of a landlord-tenant relationship? Any juror here ever been a claimant for

damages in a situation that grew out of a landlord-tenant relationship? Or has any prospective juror ever been a party against whom a claim for damages was made, [10] growing out of a landlord-tenant relationship?

(Mrs. Ruth Boyd raises hand.)

The Court: Was some damage claim made against you growing out of a landlord-tenant relationship?

Mrs. Boyd: No, sir. I have had some conditions where damages were made against my whole property by tenants, but it has never come to a definite action as yet.

The Court: You have never been a party to any litigation, I take it, where damages were sought growing out of a landlord-tenant relationship? In other words, as I understand you, Mrs. Boyd, some of your property has been damaged but there was no litigation growing out of it, is that correct?

Mrs. Boyd: It hasn't reached definite action as yet.

The Court: Well, that experience that you had, you have heard my outline of the case here, would that experience in any manner tend to influence you or cause you to lean one way or the other in the trial of this case if you were chosen as a juror?

Mrs. Boyd: No, sir.

The Court: Your personal difficulties would be something you could lay aside entirely and you could try this case and would try it under the evidence you got here and under the instructions of the Court as to the law?

Mrs. Boyd: Yes.

The Court: And you would be fair to both parties in the [11] case?

Mrs. Boyd: Yes, sir.

The Court: Is there any prospective juror who has a bias or prejudice one way or the other concerning a case of this type, that is, a case where damages are claimed, growing out of a landlord-tenant relationship? Does any prospective juror have any bias or prejudice one way or the other concerning cases of that type? Does any prospective juror have a bias or prejudice one way or the other concerning damage suits in general, that is, suits for damages in general? Has any prospective juror heard anything or read anything about this case or in any manner acquired any information about what the facts in the case are or what they purport to be, prior to coming here this morning?

Mr. Nicholas: It was in the newspapers some months ago, as I recall it. That is very vague.

The Court: You have a recollection of possibly reading some newspaper account of it?

Mr. Nicholas: Six or eight months ago or a year.

The Court: Would the reading of that article cause you to form or express any opinion one way or the other concerning the case?

Mr. Nicholas: No, just a news item.

The Court: Whatever you read wouldn't be in your mind or get any consideration by you if you were chosen to try this [12] case?

Mr. Nicholas: Not exactly, not as you described the case.

The Court: Does any juror know any reason whatever, whether I have averted to it or not, any reason whatever why she or he could not, if chosen to try this case, try it fairly and impartially, make up his or her verdict under the evidence as you got it from the witness stand and under the Court's instructions?

Counsel may examine.

Mr. Cutler: Does the fact this is a foreign corporation in Massachusetts suing an Airport Authority in Tucson, would that make any difference in your deliberation? Would you find it harder to find a verdict against a Tucson corporation and in favor of a Massachusetts corporation than if they were both equally residents of Tucson? Does the fact I am here in association with Mr. Clampitt and I am a foreigner, a New York lawyer, a city slicker, does that make any difference to you?

As far as the presentation of the facts, what his Honor tells you about the law and your deliberation about the case even if the city slicker represented a client that was right, could you find a judgment in his favor if you decide he was right? And would there be any prejudice because he was represented, in addition to my worthy friend Clampitt, by a stranger from New York? [13]

Does anyone, in addition to this lady, know Mr. Schmidt, because I will say to you frankly when it comes to our opening much of our case will depend upon the actions of Mr. Schmidt, who was the

manager of the Airport Authority, and I believe still is.

Mr. Nicholas: I know him, have known him for years.

Mr. Cutler: Do you feel, Mr. Nicholas, it would make any difference in your consideration of this case you would know Mr. Schmidt, and perhaps you knew him favorably, if you found in this case he acted improperly would you have more trouble finding against him because you knew him, than if his name was Jones and you didn't know him?

Mr. Nicholas: No. I know him socially, that is all. I don't know him in business.

Mr. Cutler: You don't feel that we require more to prove a case against Mr. Schmidt on behalf of the Airport Authority than if the man's name were Jones or somebody you didn't know, as far as your judging the case was concerned?

Mr. Nicholas: No.

Mr. Cutler: You have no prejudice against the fact that the defendant being sued here is a municipal airport authority? Do you feel you would require more evidence to hold such an Authority as Tucson Airport Authority liable than if it were an ordinary corporation doing business in the state here?

Mr. Nicholas: No. [14]

Mr. Cutler: Would your Honor permit me to address a question to the gentleman employed with the City?

The Court: Mr. Nabours?

Mr. Cutler: Yes, sir.

The Court: Surely.

Mr. Cutler: Does the fact, Mr. Nabours, that in this case the Federal Government gave the property to the City of Tucson for nothing and the City gave the property to the Airport Authority for nothing, and the Airport Authority is the defendant here, would that perhaps influence or prejudice your judgment of the City?

Mr. Nabours: No, sir.

Mr. Cutler: You feel you could try this case fairly and impartially and according to the evidence as you believe it as presented to you and under the charge of his Honor on the law?

Mr. Nabours: Yes, sir.

Mr. Cutler: That is all.

Mr. Thompson: May I ask a question of a single juror, the gentleman that indicated Mr. Clampitt represented him, Mr. Heap. Was that representation over a long period of time?

Mr. Heap: Just a substitution of my lawyer for one period.

Mr. Thompson: He substituted for your lawyer?

Mr. Heap: Yes, sir. [15]

Mr. Thompson: Were you connected with him over some considerable period of time?

Mr. Heap: Just one case.

Mr. Thompson: A short while?

Mr. Heap: Yes.

Mr. Thompson: You have stated, I believe, in answer to the Court's question that relationship wouldn't in anywise affect your deliberation in this case?

Mr. Heap: No, sir.

Mr. Thompson: Thank you, sir. We have no further questions.

Mr. Cutler: Will your Honor permit one question. Is the Mr. Boyle on this jury any relation to the Boyle in the law firm, Jim Boyle?

Mr. Thomas E. Boyle: No.

Mr. Cutler: Please forgive me for asking such a foolish question.

The Court: It might be more convenient if we recess briefly at this time. We will recess until five minutes to eleven. I will ask you to note the seats you are seated in now; when you return at five minutes to eleven, please take the same seats you are in now. While the jury has not been selected, I will ask you not to discuss the case among yourselves or with anybody else.

(Recess.) [16]

The Court: At this time the clerk will read the names of the twelve jurors who will try the case. As your names are called, will you please rise and remain standing until you have taken the oath.

(Jury called and sworn.)

The Court: Will the jurors in the box who are not going to set in this case retire to the body of the courtroom.

You may proceed with your statement.

(Opening statement by Mr. Cutler.)

(Opening statement by Mr. Evans.)

The Court: Call your first witness.

Mr. Robert Roylston: If it please the Court, even though the Government has no interest in this

suit, may the record show my appearance from the United States Attorney's office, on behalf of this witness.

The Court: The record may so show.

JAMES L. PATTILLO

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cutler): Colonel, until about a half hour ago you had never met me or knew of my existence, did you? [17]

A. That is right.

Q. Now, you are the gentleman who wrote the letter of September 26, 1951, that was referred to by my opponent in his opening, were you not?

A. Yes, sir.

Q. Would you tell the Court and jury how it came about that you wrote that letter? Did you consult Grand Central or did they come to you?

Mr. Evans: Just a minute, if the Court please, we object to that as being completely immaterial and irrelevant. The letter was written and the Court will recall it is available here in court. Certainly any reason for writing it is immaterial at this time.

The Court: I think the letter possibly ought to be identified.

Mr. Cutler: All right, I will identify it.

The Court: You might also identify the witness.

(Testimony of James L. Pattillo.)

Mr. Cutler: All right, yes. I was trying to save time, perhaps foolishly.

Q. (By Mr. Cutler): Colonel, state who you are and what your position is.

A. James L. Pattillo, Colonel, United States Air Force, United States Plant Personnel, Grand Central Aircraft Company. Air Force Plant office.

(The letter referred to being Plaintiff's Exhibit 5 for [18] identification.)

Q. The letter is now marked as Exhibit 5, dated September 26, 1951. Is that the letter you are referring to? A. Yes, sir.

Q. Now, did you go to Grand Central or did Grand Central go to you on a request for this space?

Mr. Evans: We object to that as being immaterial and irrelevant, if the Court please. The letter speaks for itself. It is improperly identified. We are not bound by anything Grand Central may have done with Colonel Pattillo.

The Court: I don't get the materiality of it.

Mr. Cutler: The materiality is this, sir, if you will be patient with me, I want to show the jury——

Mr. Evans: If the Court please, if there is going to be an offer of proof I think it should be made outside the presence of the jury.

The Court: I will sustain the objection at this time. I will give you an opportunity to make an offer of proof on it outside the jury's presence.

Mr. Cutler: Will you give me an opportunity

(Testimony of James L. Pattillo.)

to discuss the materiality of the question I am asking?

The Court: Yes.

Q. (By Mr. Cutler): Now, did you have any consultation with anyone before you wrote the letter? A. Well, I talked to—— [19]

Mr. Evans: If the Court please, we would prefer a "Yes" or "No" answer.

The Court: You can answer that "Yes" or "No," Colonel.

A. Yes, sir.

Q. (By Mr. Cutler): With whom, please?

A. Some of the people at Grand Central.

Mr. Cutler: Now, I will not ask the question your Honor has sustained the objection on in any other form at the moment, I am going to wait for the opportunity to discuss it.

Q. Now, was it your intention at the time you sent this letter that that would be an authority on which the Tucson Airport Authority could base its removal of tenants from the airport?

Mr. Evans: If the Court please, we object to that question as being leading and being completely irrelevant and immaterial. The letter speaks for itself.

The Court: The letter speaks for itself.

Mr. Evans: It isn't ambiguous and the intention of the author has nothing to do with it.

Mr. Cutler: Wait a second. In the first place,

(Testimony of James L. Pattillo.)

I am reading word for word, without change, on his examination before trial——

Mr. Evans: Not in this court, if the Court please.

Mr. Cutler: Nevertheless it is an examination before trial in which he testified. That is No. 1. No. 2, there is [20] a vast difference between a Government directive and a request by Grand Central with Government assuiescence. At least that is material before the Court and jury, and if I can show this is a request by Grand Central and not a directive on the part of the Government; and he had no power to make this directive and no authority to do so, I believe I may do so through this witness.

The Court: The letter speaks for itself. What he may have intended by it, any undisclosed intention he may have had is certainly not binding upon anybody.

Mr. Cutler: May I ask him the question whether that was a directive on his part?

The Court: The letter speaks for itself. As to what it is, his interpretation of it is not material here.

Mr. Cutler: His authority to direct is material, isn't it? I beg your Honor's pardon. Would you consider I have the right to ask that question?

The Court: No, I think the letter speaks for itself. As far as the authority is concerned, the letter itself stated who wrote it, where he was and everything else.

(Testimony of James L. Pattillo.)

Mr. Cutler: May I not show his authority contemplated or encompassed no such right?

The Court: No, the letter will speak for itself.

Mr. Cutler: I don't know what else I can do about it except if you will give me an opportunity to present that [21] question more fully. However, if I can't I would ask you to read this examination. It is only a couple of pages. I am not departing from it one inch.

The Court: I am ruling on the basis of the way this matter arises here, and the ruling is the letter will speak for itself, that any intention or interpretation that this witness might have placed upon it in communicating to the defendant here is not material nor admissible.

Mr. Cutler: May I show lack of authority to send such a letter on the part of the man who sent it?

Mr. Evans: An attempt to impeach his own witness, if the Court please.

Mr. Cutler: That is not impeachment.

The Court: Maybe I can explain my view on it. The letter which was addressed to the plaintiff in this case stated who this man was, what his title was, where the letter came from. Now, there was no question raised by anybody as to the lack of authority. They were fully informed as to who this man was and what he purported to be when he wrote the letter. I don't see that authority enters into it.

(Testimony of James L. Pattillo.)

Mr. Cutler: But we are trying to demonstrate that too, he didn't have the authority.

The Court: If you can show that, that is another matter.

Mr. Cutler: One way of showing it is to first show he didn't have the right. That is what I am trying to show here. [22] Then I am going to show by other evidence not having the right——

The Court: On your avowal you will show they knew he had no authority?

Mr. Cutler: Yes, sir, I will try to show it.

Mr. Evans: Is counsel making an avowal to that effect?

The Court: That is my understanding.

Mr. Cutler: I say to the best of my ability I will be able to show they knew this wasn't a directive and that he had no authority to make a directive that was without his province.

Mr. Evans: It certainly doesn't constitute a sufficient avowal, if the Court please, as to what he believes he might prove. And if he wants to do that, why not go ahead in the usual order of proof and do it. The way we are now he has been stating here, in effect telling the jury everything he is going to prove and is getting the cart ahead of the horse.

Mr. Cutler: Except you are not letting me prove it.

The Court: Upon your statement you may proceed, if you can show lack of knowledge or authority on the part of the defendant.

(Testimony of James L. Pattillo.)

Mr. Cutler: Q. My question was——

Mr. Evans: May I interject this. Is it with the understanding if he doesn't connect this up it will go out on motion?

The Court: Yes, you may so move, of course.

Q. (By Mr. Cutler): Was your letter an official directive of any nature?

Mr. Evans: We object to that, if the Court please, upon the ground it is leading and again it is incompetent and irrelevant. The letter speaks for itself.

The Court: The letter speaks for itself.

Mr. Cutler: Your Honor will grant me an exception.

Q. Now, did you have any authority to make an official directive of any nature in your position as a colonel in the Army?

Mr. Evans: Now, if the Court please, we object to that upon the ground it is immaterial and you cannot prove agency or authority of an agent by the testimony of an agent.

Mr. Cutler: You can prove lack of authority by an agent.

The Court: Whether he could issue an official directive is immaterial here. I don't know what you mean by an official directive."

Q. (By Mr. Cutler): Did you have any authority to compel vacation of civil space in favor of a civil corporation, Grand Central?

Mr. Evans: May we make the same objection to

(Testimony of James L. Pattillo.)

this question upon the same grounds previously urged, if the Court please?

The Court: Objection sustained.

Mr. Cutler: I wish your Honor would give me an [24] opportunity to argue that. That is a very, very important part of the case.

The Court: I will hear you at the noon recess.

Q. (By Mr. Cutler): Tell us, Colonel, please, what were your duties at this air base?

A. I was the Air Force representative with Grand Central and in charge of the Air Force Office there at the Grand Central plant.

Q. Go a little more, please, if you will, and with the Court's permission, into what your duties were.

A. My office is responsible for the inspection, flight test and production and quality control work on the Government contracts there.

Q. Now, did you have any authority to direct a civilian organization such as the Tucson Airport Authority here, did you have any such authority?

Mr. Evans: We make the same objection, if the Court please.

The Court: The objection will be sustained.

Q. (By Mr. Cutler): Did you receive any instructions or authority other than the consultation with the Grand Central regarding the matter of obtaining space at the Air Base?

Mr. Evans: Just a moment. If the Court please, we object to that upon several grounds. To begin with it is a leading question; secondly, the question has in it facts not in [25] evidence, and, thirdly, it

(Testimony of James L. Pattillo.)

is immaterial and irrelevant as the letter speaks for itself. And the question of this man's authority is certainly known to everybody involved, as the exhibits will show.

The Court: I will permit him to answer that question. You can read it to him, if you will.

(The last question read.)

The Court: Answer that "Yes" or "No".

Mr. Thompson: Before he answers, there is no testimony of any consultation with anybody at Grand Central.

The Court: I believe he did testify he had some conference with Grand Central people.

Q. (By Mr. Cutler): Did you hear the question, Colonel? A. Yes, sir.

Q. Will you please answer it as the Court says, "Yes" or "No". A. No.

Q. Colonel, does any person in the Western Air Procurement District have authority to exercise an escape or recapture clause in a lease or sale?

Mr. Evans: We object to that, if the Court please, upon the ground no proper foundation has been laid. It calls for a conclusion of the witness or an opinion of the witness; as such it is irrelevant, immaterial and incompetent.

The Court: Objection sustained. [26]

Mr. Cutler: Until I can attempt to persuade your Honor on the other question I will have to keep the Colonel here until afternoon.

The Court: We will recess until 1:30 this afternoon. During the recess I will ask you not to dis-

(Testimony of James L. Pattillo.)

cuss the case among yourselves or with anybody else or make up your minds about the case until it is finally submitted to you. You may retire.

(Jury retires from courtroom.)

The Court: All right, sir.

Mr. Cutler: Now, let me take a simple instance and let me torture the point, if I may. Suppose a corporal in the Air Force sent a letter that Grand Central should take the space, would we be bound because it is a corporal when the corporal had no more authority to send a letter than I have.

The Court: Just a moment on that point. This letter when you got it, or your client got it, said that Colonel Pattillo, who had such and such a title, at such and such a place and such and such an address, had advised them that the Government required it. Now your people then and there knew who it was that had made the request, what his position was. Let's assume he had been a corporal, because in your case you were well advised at that time as to the authority of this man from what appears at this time.

Mr. Cutler: But we weren't.

The Court: But you certainly were. You were told who [27] he was, what his position was.

Mr. Cutler: That is all. We didn't know his authority.

The Court: Here's what you are attempting to do now. You at that time waived any inquiry into authority.

Mr. Cutler: I don't think so. Let me see if I can persuade you.

The Court: That is my point. If they had sent some Air Force officer or something like that, but they told you precisely who this man is.

Mr. Cutler: What difference does that make? Suppose it was a Major General?

The Court: It makes this difference. Upon his disclosure of who he is, so you know exactly what his position is, you act and move out of the place on that basis; it isn't my view of the law you can now come in and say, well, it is true we were advised who the man was, now we want to show he had no authority.

Mr. Cutler: If your Honor please, fraud has always permitted evidence to show reliance on a misrepresentation, whether relied on stupidly is a question for the jury. But certainly, it isn't a question of law. Let's see if I can make that clear. It doesn't make any difference to me if it was a corporal that wrote it or a Major General if the Major General will say he had no authority to write it, and nobody in the Western District had authority to write it, and he wrote [28] it as a favor for Grand Central and says that, and Grand Central procured it and obtained it and got it and I didn't know all that, and the Corporal and the Major General, I don't care who he is, wrote such a letter, may I not show that Corporal had no such authority?

(Testimony of James L. Pattillo.)

The Court: Not unless you show also that the defendant knew he didn't have the authority.

Mr. Cutler: I am going to show the defendant knew he had no such authority.

The Court: If you show that, of course, I have said if you will prove that I will permit it.

Mr. Cutler: I am going to try my utmost. I think I can prove it.

The Court: Let's do it this way. Let's proceed to prove the knowledge on the part of the defendant before we go into the matter.

Mr. Cutler: You realize, of course, your Honor, the defendant is a hostile witness and if I know him I am making my case, not the defendant, of course.

The Court: You can cross examine an adverse witness.

Mr. Cutler: I realize that, but he is still an adverse witness. But I think it is unfair to place that burden on me in view of this point.

The Court: I can shorten it up if you will avow you will show it, then I will permit you to go into authority right now; [29] if you can't and you can only tell me you hope to do it, I will deny you the opportunity to show knowledge on the part of the defendant before you go into the question of lack of authority.

Mr. Cutler: The only way I can, as an officer of this Court, avow I can show it is tell you I am going to put Mr. Schmidt on as my next witness, after I show you this man had no authority, re-

(Testimony of James L. Pattillo.)

quested to send it by Grand Central—and Mr. Schmidt is listening. I intend to try to prove through him——

The Court: In view of that statement it will be my ruling you show the lack of authority first or attempt to show it, then we will reach the question of authority after that.

Mr. Cutler: Lack of authority?

The Court: Lack of knowledge.

Mr. Cutler: Lack of authority is what I am trying to show now.

The Court: I will not permit you to go into lack of authority until you have first made your showing on knowledge of lack of authority on the part of the defendant.

(Further statement by counsel.)

The Court: I still have the same view, that is, that the matter of authority or lack of authority, unless you show that it was known to the defendant, would not be admissible here. And in view of the situation that you were not able to avow you can prove it, I can only see one thing to do in [30] fairness to all concerned, and that is let you make your attempt to show that knowledge on the part of the defendant.

Mr. Cutler: I am afraid I have not made the point in my clumsy and inept way. My point is: Whether they knew it or said something which was untrue and didn't know it, as far as fraud is concerned makes no difference. If I say: "This cow is sound and has good wind"—if that is the way

(Testimony of James L. Pattillo.)

you sell a cow—and I know it to be untrue, that is fraud. But if I say it and don't know it to be untrue, it is still fraud and I think I have a right to prove it that way.

The Court: Where as much knowledge as the defendant has about the authority of the Government agent is disclosed to the plaintiff?

Mr. Cutler: But you are deciding a question the jury should decide. I say respectfully that is a question of fact always in a fraud case.

The Court: No.

Mr. Cutler: All right. Thank you.

(Whereupon a recess was taken at 12:15 o'clock p.m. until 1:30 o'clock p.m.)

Mr. Cutler: If your Honor please, I would like to call the Court's attention to the case of Diamond Cattle Company vs. Clark, 116 A.L.R., 74 Pac. 2d.

The Court: I have read it. [31]

Mr. Cutler: I believe that is the authority for the point I made at recess. I don't want to repeat it now.

The Court: The ruling will stand. I am familiar with the case. It was cited to me on the pre-trial, so I have read it.

Mr. Cutler: Could I have your indulgence for about two minutes more. I wanted to possibly give you one more example. I don't think I should speak in the presence of the jury unless you want me to.

The Court: The ruling will stand. I will give you an opportunity at recess to pursue it further.

(Testimony of James L. Pattillo.)

Mr. Cutler: All right. Colonel, will you take the stand again, please.

(Colonel Pattillo resumed the witness stand.)

Q. (By Mr. Cutler): Did you have authority to demand space at the Tucson Airport?

Mr. Evans: We object to that, if the Court please, upon the ground it is immaterial, irrelevant, and upon the previous grounds urged.

The Court: The objection will be sustained.

Mr. Cutler: Then, Colonel, you will have to wait until I finish. [32]

ROBERT SCHMIDT

called as a witness herein, having been first duly sworn, testified as follows:

Examination by Mr. Cutler:

Q. Mr. Schmidt, you are the manager of the defendant airport? A. That is right.

Q. And you were in 1951 and prior thereto?

A. Yes, sir.

Q. Now, did you know that Colonel Pattillo had no authority to demand or take space?

A. No.

Q. Did you know whether he did have the authority? A. No.

Q. Did you investigate whether Colonel Pattillo had the authority to take space at the airport?

A. Yes.

Q. But on the pre-trial examination, instead of

(Testimony of Robert Schmidt.)

what you just said, you made the following answer to the following question:

“Question: You didn’t investigate whether or not the Air Force had authorized Mr. Pattillo to take this action?” And you answered, “No.” Right?

Mr. Evans: Hold that just a moment, Mr. Schmidt. If the Court please, is there a deposition of Mr. Schmidt in this [33] action?

The Court: Yes. Will you advise counsel——

Mr. Cutler: Page 28, line 12 to 15, are the exact words I just read.

Mr. Evans: All right. We misplaced our copy of the deposition.

(The last question was read.)

Q. (By Mr. Cutler): Is that true?

A. That was true at the time, yes.

Q. Was it true when you said it?

A. I had written the Civil Aeronautics Administration to find out.

Q. When you answered that question that way on the 12th day of June, 1952, in the deposition taken, was your answer to the question true?

A. It was at that time, yes.

Q. Has it become untrue since?

A. No.

Q. Now, you knew, of course, that Pattillo, Colonel Pattillo, said he did not have the authority to demand space, did you not?

A. I know that subsequent to his letter some months later he said he didn’t have the authority, yes.

(Testimony of Robert Schmidt.)

Q. You knew certainly when his deposition was taken in January, 1953, that he said he didn't have the authority then [34] to do it, didn't you?

A. I never read his deposition.

Q. You never read the deposition?

A. I have never seen his deposition.

Q. Are you familiar with the fact there was a case entitled Arizona Institute of Aeronautics——

A. Yes.

Q. ——against your company?

A. Yes.

Q. Of which you were the manager, this company? A. Right.

Q. And are you aware of the fact that in that case Colonel Pattillo's deposition was taken?

A. I have heard it had been taken, but I have not read his deposition.

Q. You are telling the jury you never read it although you knew it was taken?

A. That is right.

Q. You never discussed with the lawyers in this case the fact that Pattillo said in that deposition he had no authority to do it?

Mr. Evans: That is immaterial, if the Court please. He is attempting to get into evidence the matters in the deposition by improper manner. We certainly object to it.

The Court: He may answer this question. [35]

Mr. Evans: Anything he discussed with his attorney about it would be privileged in any event.

Mr. Cutler: It wouldn't be privileged for me to

(Testimony of Robert Schmidt.)

find out whether he knew it, I am sorry about that. Will you please repeat the question. I believe his Honor ruled he may answer.

The Court: Answer that "Yes" or "No."

(The last question was read as follows: "Question: You never discussed with the lawyers in the case the fact that Pattillo said in that deposition he had no authority to do it?")

The Court: Just a moment. He may answer.

A. Yes.

Q. (By Mr. Cutler): And you knew in September of 1953 that Pattillo hadn't requested that the space be taken over——

Mr. Evans: If the Court please——

Mr. Cutler: Wait a minute. May I finish my question, please?

Mr. Evans: I beg your pardon.

Q. (Continuing): But that Grand Central had requested Pattillo to take the space over, didn't you?

Mr. Evans: If the Court please, it is completely immaterial and irrelevant what the witness knew in September, 1953. This all transpired in 1951.

Mr. Cutler: I meant September, 1951. Forgive me. I am talking about the time of the letter. Is there any objection now to the question? [36]

Mr. Evans: Change the time to 1951?

The Court: 1951.

Mr. Evans: No, if he knows we have no objection.

Mr. Cutler: It wasn't necessary for you to say

(Testimony of Robert Schmidt.)

that, please. I don't want you to intimate what he should say.

A. I wish you would restate that again.

Mr. Cutler: Would you re-read him the question?

(The last question was read.)

A. I can't answer that question the way it is worded.

Q. I will ask the Court to direct you to answer the question "Yes" or "No."

The Court: Read him the question again.

(The last question was read.)

Mr. Evans: That doesn't make sense, if the Court please. The question says that you know he didn't do it, but it says that he did do it.

Mr. Cutler: If the question didn't make sense, it didn't make sense before and you didn't object. Are you objecting now?

Mr. Evans: I certainly am.

Mr. Cutler: All right. We will have it determined.

The Court: The objection will be sustained.

Q. (By Mr. Cutler): Didn't you know that Pattillo hadn't requested the space?

A. I don't understand the nature of the question. [37]

Q. You have been in Air Force work how long?

A. I got a letter from him——

Q. Excuse me, please. You have been in Air Force work how long?

A. I haven't been in Air Force work at all.

(Testimony of Robert Schmidt.)

Q. What kind of work have you been doing for the last fifteen years? A. Airport work.

Q. I beg your pardon. Airport work. You have been at it how long? A. Since 1929.

Q. And you are pretty familiar with the ways of the CAA, the CAB and all the other initials relating to airports, aren't you?

A. Reasonably so, yes, sir.

Q. You are telling me now you don't understand my question, which is, whether you knew whether Pattillo had requested the space?

The Court: Just a moment. Requested from whom? I think that is the difficulty he has with your question.

Mr. Cutler: Requested from Tucson Airport Authority.

The Court: If you will include that in the question.

Mr. Cutler: Yes, sir, I do include it in the question.

A. I got a letter dated the 26th of September——

Q. I didn't ask you that. I will ask for a "Yes" or "No" [38] answer, please. I don't want to go into the letters yet. I will go into the letters. I will give you a chance to talk about the letters. I would like that question answered, please.

A. Well, your Honor——

The Court: The question is, Mr. Schmidt, did you know in September, 1951, that Pattillo had

(Testimony of Robert Schmidt.)

requested the space from the Tucson Airport Authority?

A. I didn't know it until I got the letter. That is what I am trying to make clear.

Q. Didn't you know that Grand Central had requested Pattillo to request the space?

A. No.

Q. Didn't you know that it was Grand Central that was requesting the space and not the Government?

A. Not in that exact light, no, sir.

Q. Didn't you know that the Government didn't need to request the space, it could take the space without compensation, didn't you?

A. It could take it with or without compensation.

Q. And you recognize, Mr. Schmidt, a difference between the Grand Central taking it over, don't you?

A. Yes.

Q. And, as a matter of fact, in the letter of September 26 Pattillo again and again referred to Grand Central taking the [39] space, is that right?

Mr. Evans: We object to that, if the Court please, upon the ground the letter is the best evidence.

Mr. Cutler: I certainly may have the operation of his mind on the letter, best evidence or not best evidence.

The Court: The letter is the best evidence.

Mr. Cutler: If your Honor pleases, I make this offer of proof.

(Testimony of Robert Schmidt.)

Mr. Evans: I object to it being made within the presence of the jury.

Mr. Cutler: I will make it outside the presence of the jury.

The Court: Very well. Ladies and Gentlemen of the Jury, counsel have indicated they desire to take up a legal matter with the Court which can only properly be done in the absence of the jury. I will ask you to remain outside until the bailiff calls you to return.

(The jury retires from courtroom.)

The Court: I might say to counsel, if you desire to examine the witness about a letter the first thing we should do is have the letter in evidence.

Mr. Cutler: I intend to.

The Court: It is not in evidence. Then if you desire to direct his attention to something in the letter our practice is to hand it to him, give him an opportunity to see what it is [40] you desire his attention directed to.

Mr. Cutler: Of course ours is a different practice. I have to conform to your practice. But I now want to state what my offer of proof is. There is no jury present.

In the letter of September 26, 1951, there are fifty ten references to whom was taking over the space, Grand Central. However, this man in writing of what that letter said, not sending the letter to us as your Honor said in some of our discussion before, but writing of the contents of that letter, said not the Grand Central was taking the

(Testimony of Robert Schmidt.)

space over on a rental basis, but the Government had demanded the space. I want the jury to know why he transposed that language and if he didn't do so knowingly, in view of his already given testimony, that he knew Pattillo didn't have the authority and that he didn't know who had requested, and so forth. That, it seems to me, is very clearly admissible. I would certainly do it the way you suggest, but it is admissible.

The Court: There is no argument about that. It is a matter of how we proceed.

Mr. Cutler: All right. I will take it the way you want me to take it, of course. I don't want because I am inept here to have my client deprived of his rights.

The Court: No. The whole thing is a matter of procedure. Call the jury.

(Jury returns to courtroom.) [41]

Mr. Cutler: May I offer in evidence, your Honor, in order to conform with proper procedure in this court, the letter of September 26, 1951, which is already conceded to be a proper order. It is marked on the back as Exhibit No. 5.

Mr. Evans: We have no objection to that offer.

The Court: It may be received in evidence.

(Plaintiff's Exhibit 5 in evidence.)

Mr. Cutler: I will now offer in evidence the letter of the witness to the plaintiff, dated October 18, 1951, likewise in evidence already as Exhibit—that is in the pre-trial, but marked Exhibit 2.

Mr. Evans: No objection.

(Testimony of Robert Schmidt.)

The Court: It may be admitted.

(Plaintiff's Exhibit 2 in evidence.)

Mr. Cutler: Am I permitted to read this letter to the jury?

The Court: Surely.

Mr. Cutler: Will you please read it to them, Mr. Clampitt?

(Plaintiff's Exhibit 5 read to the jury as follows:)

"Air Force Plant Office, Grand Central Aircraft Co., Glendale Region, Western Air Procurement District.

"September 26, 1951, Tucson Airport Authority, Tucson Municipal Airport, Tucson, Arizona.

"Gentlemen:

"This office would like to inform you as to present office [42] and storage space requirements of Grand Central Aircraft Co. and ask your cooperation in their relief. The piecemeal but continued additions to Air Force programs in work at Grand Central have repeatedly caused the company to outgrow facilities. Continued growth, again, causes Grand Central to be faced with a need for additional office and storage space.

"It appears the lack of a firm, overall plan for Air Force programs at this plant has caused Grand Central's space requirements to grow at an uneven and unpredictable rate and your generous efforts to accommodate both the company and the Gov-

(Testimony of Robert Schmidt.)

ernment have been at considerable inconvenience to yourself. The way in which you have recognized the urgency of these programs and, in spite of the inherent uncertainty of their futures, made space available to Grand Central is gratifying. At present, the Air Force is endeavoring to expand to meet the overall defense program which Congress has authorized and a very important segment of that expansion depends on the airplanes which Grand Central is reconditioning locally. The size of recent Congressional appropriations for Air Force expansion, the immediate need the Air Force has for additional bombers, and the fact that a substantial number of B-29's cocooned at Davis-Monthan Air Force Base are not yet contractually committed, all contribute to the Air Force's desire that Grand Central increase the rate of its local output and continue to for some time to come. This office regrets that even [43] at this point it is unable to give you an intelligent and detailed plan of programs the Air Force will want or be able to put into work at this plant in the years ahead, however, it is expected they will be quite large.

"As indicated above, Grand Central, in its efforts to meet the Air Force's changing requirements, now finds itself in need of additional office and storage space. Based on present programs and the little information this office has on future programs for this facility, it is requested that all undercover space on Tucson Municipal Airport occupied by the AAF and Consolidated-Vultee during World

(Testimony of Robert Schmidt.)

War II be made available immediately for rental or lease by Grand Central Aircraft Co.

"It is requested that this letter and its contents be handled as a confidential matter.

"Very truly yours, James L. Pattillo, Lt. Colonel, USAF, AF Officer-in-Charge."

Mr. Clampitt: I will now read you——

Mr. Cutler: Wait a minute.

Q. (By Mr. Cutler): Now, with your twenty-four years experience in airport work, Mr. Schmidt, you knew the difference between Grand Central taking it over for rent and the Federal Government taking it, did you not? A. Certainly.

Q. And there is a distinction, isn't there? [44]

A. The letter came from the Air Force——

Q. Please. I don't want to hear any more now. Is there a distinction? A. Yes.

Q. You heard the letter head by Mr. Clampitt, the attorney of record here, to the jury, did you?

A. Yes.

Q. You heard the repeated references to Grand Central taking the space, did you?

A. Certainly.

Q. Did you not in the letter in evidence dated October 18 written by you, did you not say that the Federal Government requires the use of certain space? A. Certainly.

Q. Did you give a copy of this Grand Central letter of September 26 that is now in evidence to

(Testimony of Robert Schmidt.)

the plaintiff when you sent the letter of October 18?

Mr. Evans: We object to that, if the Court please. It assumes a fact not in evidence. The true fact is, it is a letter of Colonel Pattillo not the Grand Central's letter.

Q. (By Mr. Cutler): It was marked "Grand Central." At any rate, it is the exhibit. Withdrawn.

Did you give in your letter of October 18 a copy of the exhibit that is now in evidence, marked Plaintiff's Exhibit 5? A. The letter—— [45]

Q. Did you or didn't you?

A. I don't recall.

Q. Will you read the letter and see whether you did? You don't recall?

A. I would like to read the exhibit.

Q. Do you recall? A. I don't.

Q. Now, you may look at the letter marked Exhibit 2 and see whether that refreshes your recollection.

A. There is no indication a copy of it was transmitted with it.

Q. You know now you didn't send a copy of the Pattillo letter?

A. Not at that time at least.

Q. You know that, do you?

A. Yes, sir.

Q. Now, you did refer to the letter of September 26, didn't you? A. Yes.

Q. In your letter of October 18, both in evidence? A. Yes.

(Testimony of Robert Schmidt.)

Mr. Cutler: Now may I have the exhibit, the second one which has not been read, read to the jury, your Honor?

Mr. Clampitt: This is a letter with the heading: "Tucson Municipal Airport." [46]

(Plaintiff's Exhibit 2 was read to the jury as follows:)

"October 18, 1951, Registered Mail, Return Card.

"Mr. Julius Brauer, President, Worcester Felt Pad Corporation, 11 Brackett Court, Worcester, Massachusetts.

"Dear Mr. Brauer:

"Reference is made to the agreement dated the 1st day of March, 1949, by and between Tucson Airport Authority and Worcester Felt Pad Corporation and to our letters of June 3, 1950, and December 30, 1950, reflecting its modification with respect to change of space to be used by you.

"Your attention is invited to provision (4) of the aforementioned agreement which reads:

" "The lessee recognizes the right of the Federal, State and Local Governments to restrict or limit the use of the Airport by the City of Tucson and/or Tucson Airport Authority in the event of national emergency, and in the event of such action depriving either the lessee or the lessor of normal enjoyment, agrees to a suspension or termination of the lease at the option of either the lessor or

(Testimony of Robert Schmidt.)

the lessee. In the event of termination, the lessee shall have the right to remove all of his property within thirty days after termination, but all items remaining after thirty days may, at the lessor's option, become its sole property.'

"Tucson Airport Authority has been formally advised under date of September 26, 1951, by the Officer-In-Charge, Air Force [47] Plant Office, Grand Central Aircraft Company, Glendale Region, Western Air Procurement District, that the Federal Government requires the use of certain covered space on Tucson Municipal Airport which includes all of the space now occupied by you. This request has been verified by the Chief, Airport Division, Civil Aeronautics Administration, Los Angeles, by a communication dated October 9, 1951, as an action consistent with the demands of the national emergency and one which constitutes an exercise of proper authority for the use of said space.

"Accordingly, by virtue of action by the Board of Directors of Tucson Airport Authority on October 17, 1951, the writer has been instructed, authorized, and empowered to notify you that the agreement dated March 1, 1949, is, therefore, to be terminated on October 31, 1951, and the space now occupied by you is to be vacated in its entirety no later than November 30 in accordance with the last sentence of provision (4) cited hereinbefore.

"We regret the necessity of this action, but we know that you fully recognize that the interests of

(Testimony of Robert Schmidt.)

national defense must transcend personal considerations.

“Yours very truly, R. W. F. Schmidt.”

Q. (By Mr. Cutler): Now, Mr. Schmidt, was there some reason in your mind why you preferred in the letter of October 18 not to send Pattillo's letters to them, but to draw your own conclusions as to what that letter meant? [48]

A. My conclusion was based on the statement——

Q. Excuse me. I didn't ask you that. You are not answering my question, if I may be so bold. Was there some reason? A. No.

Q. It just happened you didn't send it, is that it? A. Right.

Q. And the statement that the Federal Government wanted the property was a conclusion that you drew, not in Pattillo's letter, was it not?

A. I can't answer that “Yes” or “No.” I have to qualify the answer.

Q. And isn't that the reason why you didn't send a letter? A. No.

Q. Of September 26 in your letter of October 18? A. No.

Q. Now, in the pre-trial examination did you not make the following answers to the following questions—I am reading from page 25 and when I get to another page, I am going on from there, I will let you know.

“Question: All you know, then, regarding their

(Testimony of Robert Schmidt.)

actions,” “their” being specified in the previous question as Duckworth or Pattillo, “in the taking over of property and speaking for the Federal Government in the demanding of possession of property, it is hearsay, is it not? It is what someone else told you? [49] “Answer: Yes.

“Question: Has either Duckworth or Pattillo at any time, since you have been manager of the Tucson Municipal Airport, demanded of you the possession of any part or portion of the Municipal Airport on the ground that they are an agent of the Federal Government and order it?

“Answer: Yes.

“Question: Do you have the document, page 26, that you referred to? “Answer: Yes.

“Question: What is the date of that document?

“Answer: September 26, 1951.”

That is the same document from Pattillo that is now in evidence to which we just referred, is it not?

A. Yes.

Q. I am on page 27:

“Question: Now that demand, I believe you said, was in September?

“Answer: September 26, 1951.

“Question: Now, that letter was the basis for your registered letter to the Worcester Felt Pad Company dated October 18, 1951, in which you notified the Worcester Felt Pad Corporation that their lease was terminated under the provisions of provision 4 of their lease?

“Answer: Partially. [50]

(Testimony of Robert Schmidt.)

“Question: Was any other demand served upon you by any other agency of the Federal Government?

“Answer: Colonel Pattillo’s letter of September 26, 1951, was referred to the Civil Aeronautics Administration for a ruling as to whether or not the request constituted a valid exercise of authority.

“Question: Was the Civil Aeronautics Administration Mr. Pattillo’s superior officer or agency over him?

“Answer: No. The instruments of transfer to the City of Tucson covering the property in question recite the Civil Aeronautics Administration as the guardian and service agency in such matters and would be and is the agency to which the municipality or public airport owner would look for a determination.

“Question: In other words, you assumed that Mr. Pattillo had the legal right to speak for the Air Force, United States Air Force?

“Answer: We contacted the Civil Aeronautics Administration to find out if the request was a valid request.

“Question: You didn’t investigate whether or not the Air Force had authorized Mr. Pattillo to take this action? “Answer: No.

“Question: The Civil Aeronautics Administration is not over Mr. Pattillo and does not direct his activities?

“Answer: Only to the extent that the statutes prescribe procedures to be followed. [51]

(Testimony of Robert Schmidt.)

“Question: Isn’t the United States Air Force an independent agency of the Federal Government not in any way connected with the Civil Aeronautics Administration?”

“Answer: I presume it is an independent agency, yes.”

Q. Page 29:

“Question: Do you know if the Air Force consulted the CAA in connection with this matter that Mr. Pattillo made demand?”

“Answer: No.

“Question: Did the Civil Aeronautics Administration inform you that they had made any consultation or request to them?”

“Answer: No.

“Question: Did you ask the Civil Aeronautics Administration whether the United States Air Force had consulted them at all about this?”

“Answer: No, no.”

Mr. Evans: If the Court please, I haven’t found any contradictory statements yet——

Mr. Cutler: Excuse me, please. That is a very improper statement for you to make, you know it is improper——

Mr. Evans: If the Court please——

Mr. Cutler: You have no right to argue——

The Court: Just a moment, just a moment. Let counsel address his remarks to the Court. [52]

Mr. Cutler: I beg your Honor’s pardon. I object to comments at this time during the trial by my opponent.

(Testimony of Robert Schmidt.)

Mr. Evans: We want to enter an objection, if the Court please, to any further reading——

Mr. Cutler: I don't object to the objection. I object to the comments. The time to argue the case is when we get to the jury.

The Court: Go ahead and state your objection.

Mr. Evans: I object to any further reading from the deposition of Mr. Schmidt taken on June 12, 1952, upon the ground there has been no proper foundation laid; upon the additional ground the matters counsel is reading from the deposition of that date are not contradictory in any manner, do not constitute legitimate evidentiary matters for impeachment or any other purposes.

The Court: The objection will be sustained. That is, I will direct counsel not to go into questions or answers that are not impeaching.

Mr. Cutler: I had intended to stop right there anyway.

The Court: Very well, there is no harm done.

Mr. Cutler: That is why I can't stop him from making the objection, but I still believe that argument is not proper at this point. That is all I objected to and I was wrong in stating it to him instead of stating it to you.

Would your Honor indulge me for half a moment? [53]

The Court: Surely.

Mr. Cutler: I offer in evidence the letter of October 4, 1951, signed by Schmidt on behalf of the

(Testimony of Robert Schmidt.)

defendant and addressed to Pattillo, and thus far called Exhibit B.

The Court: Is counsel familiar with that letter?

Mr. Evans: Not offhand. Yes, I recall it.

The Court: Any objection to it?

Mr. Evans: No objection.

The Court: It may be admitted.

(Plaintiff's Exhibit 8 in evidence.)

Mr. Clampitt: For the record I call the clerk's attention to the fact this is Defendant's Exhibit B which is now being marked Plaintiff's Exhibit 8, is that right?

The Clerk: In evidence.

Mr. Clampitt: Thank you.

Mr. Cutler: Could I ask your Honor's indulgence to the extent of reading this letter?

The Court: Surely.

Mr. Cutler: You read it, please. Your Honor, of course, will listen to it.

Mr. Clampitt: I am reading, of course, Plaintiff's Exhibit 8 in evidence.

(Plaintiff's Exhibit 8 was read to the jury as follows:)

"Tucson Airport Authority, P. O. Box 1191, Tucson, Arizona, October 4, 1951. [54]

"Lt. Colonel James L. Pattillo, AF Officer-In-Charge, Grand Central Aircraft Company, P. O. Box 5072, Tucson, Arizona.

"Dear Sir:

"Reference is made to your letter of September

(Testimony of Robert Schmidt.)

26 requesting for and in behalf of the Air Force 'All of the undercover space on Tucson Municipal Airport occupied by the Army Air Force and Consolidated-Vultee during World War II' for rental or lease to Grand Central Aircraft Company.

"Although I did not have this communication in hand, as the result of our previous conversations and earlier requests from Grand Central Aircraft Company itself, I discussed the overall problem at length with the Airports Advisory Committee and with members of the Airports Use Panel, the latter group including fully authorized personnel of the Air Force, Navy, CAA, CAB, et cetera, in Washington last week.

"Taking your letter literally, that is, 'all covered space', would, of course, terminate civilian operation at this airport, an action which is contrary to the present intent of the Departments of National Defense and Commerce and which would require condemnation proceedings in the courts to establish values for reimbursement by the Government so that other facilities could be developed to serve the scheduled air carriers, the crop dusters, executive aircraft owners—both transient and local—the facilities of the U. S. Weather Bureau and the Civil Aeronautics Administration, the flight [55] schools and charter operators, and finally Tucson Airport Authority itself. The Wichita Municipal Airport case is cited as an example of this type of proceeding, and if this be your

(Testimony of Robert Schmidt.)

intent, the Department of Justice should then be appraised of your wishes.

“However, in the absence of a clear-cut determination as to probable use of this facility (one which I certainly was unable to obtain from an assortment of Air Force representatives in Washington, which is also expressed as an unhappy fact in your letter), and in view of the policy declared by each representative of each agency—that civil aviation is to continue to operate without undue imposition and hardship, and that joint civil and military occupancy is ordinarily an attainable goal—I am taking the liberty of making a broader interpretation of your letter, namely, that we proceed to make available all covered space ‘formerly occupied’, et cetera, where it is legally permissible and physically practicable for us to vacate or secure vacancy thereof for the purpose stated.

“You understand that leases will have to be terminated by due notice, that protests may be filed, and that negotiations toward favorable settlement will require time. Without assurances from the Air Force or Grand Central that Tucson Airport Authority will be reimbursed for any losses incurred by such actions, we must necessarily proceed with care.

“I have already asked for opinions from the Civil [56] Aeronautics Administration as to the feasibility and legality of the several steps which we may take, and at the next meeting of our Board of Directors on October 17th, I shall present the

(Testimony of Robert Schmidt.)

entire problem as basically portrayed in your letter of September 26th. There are, as you know, several possible courses open to us, but each represents a policy determination which must have Board action.

“As you have indicated and as I again repeat, we are entirely sympathetic with the problems which confront the Air Force and Grand Central Aircraft Company, and we shall make every effort to accede to your mutual requests within the limits of our legal and moral responsibility to operate and maintain well-rounded airport facilities for greater Tucson.

“Yours very truly, R. W. F. Schmidt.”

Q. (By Mr. Cutler): Just one more question, Mr. Schmidt, and I shall be done with you. You didn't send a copy of the letter of October 4, Exhibit 8, Plaintiff's, just now read to the jury, to the plaintiff either, did you? A. No, sir.

Q. Nor the letter of September 26, 1951, of Pattillo's?

A. Not that I recall, no, sir.

Q. This was a private correspondence between you and Pattillo?

A. I wouldn't say it was private correspondence, no.

Q. Was it private as far as the plaintiff was concerned? [57]

A. Our files are open to the public.

(Testimony of Robert Schmidt.)

Q. I didn't ask that. Was it private so far as the plaintiff was concerned? A. No.

Mr. Cutler: That is all.

Examination by Mr. Evans:

(Defendant's Exhibit C marked for identification.)

Q. Mr. Schmidt, I hand you a copy of the exhibit marked Defendant's Exhibit C for identification and ask you if you can tell us what that is?

Mr. Cutler: I don't understand the question.

Mr. Evans: I am asking him to identify the exhibit, Counsellor.

Mr. Cutler: What exhibit? What do you mean?

Mr. Evans: Exhibit C, Defendant's Exhibit C marked for identification.

Mr. Cutler: You mean to identify it by stating what it is?

Mr. Evans: I am asking him to identify the exhibit, not to read it.

Mr. Cutler: All right.

A. Yes, sir, I am familiar with that.

Q. And what is it?

A. It is a letter from Colonel Pattillo directed to the [58] Airport Authority.

Q. Acknowledging receipt of your letter of October 4, 1951, which is in evidence as Plaintiff's Exhibit 8? A. Yes, sir.

Q. Calling your attention——

Mr. Cutler: Is that an exhibit now?

Mr. Evans: It has not been offered, no.

Mr. Cutler: I don't know, is it the proper prac-

(Testimony of Robert Schmidt.)

tice for you to get the contents of a letter identified without first offering it in evidence and saying what you say it says?

Mr. Evans: We generally, of course, here we have to identify it before we can offer it in evidence.

Mr. Cutler: But you have identified it by stating a conclusion what it is. Don't you have to offer it in evidence before you may?

The Court: I think he did identify it as a letter from Colonel Pattillo, acknowledging——

Mr. Cutler: May I see it, then?

Mr. Evans: Certainly.

Mr. Cutler: Are you offering it?

Mr. Evans: I am not offering it in evidence, no, not at this time.

Mr. Cutler: Well, then, I think your Honor should strike out on my motion the characterization of the letter, it was an acknowledgment of the letter, until the letter is in [59] evidence. There is much more in it than that.

The Court: May I see it?

Mr. Cutler: That is only three lines but there is more.

Mr. Clampitt: I call the Court's attention this did not appear in the pre-trial.

The Court: That is true.

Mr. Evans: If the Court please, I will ask him to identify it by the addressee and the signer——

The Court: The jury will disregard all the wit-

(Testimony of Robert Schmidt.)

ness' answer except it is a letter addressed to Tucson Airport Authority by Colonel Patillo.

Mr. Cutler: Thank you, sir.

Mr. Thompson: And the date, if it please the Court.

The Court: Under date of October 10, 1951.

Q. (By Mr. Evans): Was the original of this letter received by you, Mr. Schmidt?

A. Yes, sir.

Q. Calling your attention, Mr. Schmidt, to the plaintiff's Exhibit 5 in evidence, which you will recall was the letter of September 26, 1951, of Colonel Pattillo addressed to the Tucson Airport Authority, was Colonel Pattillo's request in that letter its contents be handled as a confidential communication, is that correct? A. Yes.

Mr. Evans: That is all. [60]

Re-Examination by Mr. Cutler:

Mr. Cutler: I now offer in evidence the letter my friend didn't offer.

Mr. Evans: We have no objection whatsoever.

The Court: It may be admitted.

Mr. Evans: I am assuming he is referring to the letter of October 10.

Mr. Clampitt: The Defendant's Exhibit C for identification will now be marked Plaintiff's Exhibit——

The Clerk: 9 in evidence.

Mr. Evans: We have no objection.

(Testimony of Robert Schmidt.)

The Court: Plaintiff's Exhibit 9 in evidence.

(Plaintiff's Exhibit 9 in evidence.)

Mr. Cutler: Would your Honor permit me to read these three lines to the jury?

The Court: Very well.

Mr. Cutler: Addressed to the Tucson Airport Authority on the stationery of Colonel Pattillo:

"I would like to express our appreciation for your very considerate letter of 4 October 1951 and ask that you advise this office as to the Board's decisions in this matter. Very truly yours, James L. Pattillo, Lt. Colonel, USAF, AF Officer-In-Charge."

Q. (By Mr. Cutler): Did you send a copy of this letter to the plaintiff? Did you? [61]

A. No.

Mr. Cutler: That is all.

Mr. Evans: No further questions.

J. LESLIE HANSEN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cutler): Mr. Hansen, please state your business?

A. I am a real estate appraiser, realtor appraiser.

Q. How many years have you been in that business?

(Testimony of J. Leslie Hansen.)

A. I have been in the real estate business since 1924 and appraising professionally since 1938.

Q. Will you state some of your professional connections and the companies and institutions and Government agencies and authority that you have appraised properties for?

A. I have appraised properties for the Valley Bank, the First National Bank, the Reconstruction Finance Corporation, the Reclamation Bureau, the State of Arizona, Life Insurance Companies, savings and loan associations, individuals, lawyers.

Q. Life insurance companies, including Equitable Life and Commercial Life and the Benefit Insurance Company, Kansas City Life of Dallas? [62]

A. Yes, sir.

Q. Of Dallas another one?

A. That is Southland Life; Occidental Life Insurance Company, Metropolitan Life Insurance Company, Massachusetts Mutual Insurance Company.

Q. And have you done work for five years, from 1941 to 1946, for the Federal Housing Commission?

A. Yes. Yes, part time was at per diem matter and part time was as part of the staff for the Federal Housing Administration, being sent here in 1946 to take charge of the appraisal office in the State of Arizona.

Q. Was that appraisal work appraisal of realty?

A. Yes.

(Testimony of J. Leslie Hansen.)

Q. I notice the initials "M.A.I." on your card. What does that mean?

A. That means I am a member of the American Institute of Real Estate Appraisers.

Q. And how many are there in the whole state of Arizona that are such appraisers?

A. There are four.

Q. How many are there in the whole country?

A. Something like fourteen hundred and thirty.

Q. What real estate appraisal or real estate boards, and so forth, do you belong to?

A. I belong to the Arizona State Association of Real Estate [63] Boards, the Phoenix Real Estate Board and by its affiliation the National Association of Real Estate Boards. I am a senior member of the Society of Residential Appraisers and also a member of the American Institute of Real Estate Appraisers.

Q. Of what association were you president for two terms?

A. I have been president of two different chapters of the Association of Residential Appraisers.

Q. Where was that?

A. One in Chicago and one in Phoenix.

Q. Phoenix, this state, Arizona?

A. Yes, sir.

Q. Are you also a licensed real estate broker?

A. Yes, sir, I am a licensed real estate broker and realtor.

Q. And have you in your career lectured on appraisals in Arizona, in Chicago and other cities?

(Testimony of J. Leslie Hansen.)

A. I have.

Q. Now, have you appraised in the state of Arizona leaseholds, realty and property that comes under the classification of real estate?

A. All the time.

Q. Have you appraised in this city, in Tucson?

A. I have.

Q. In Flagstaff and Prescott and Bisbee and Pima County, Santa Cruz County?

A. State-wide. [64]

Q. Incidentally, it was you that appraised the El Conquistador, wasn't it?

A. That is right, in May, 1951.

Q. In May, 1951? A. Yes.

Q. How did it happen you appraised that? Did you appraise it for somebody?

A. For the Southland Life Insurance Company of Dallas, Texas.

Q. What name?

A. The Southland Life Insurance Company of Dallas, Texas.

Q. You also appraised part of the Grand Canyon in Arizona, I believe you told me that?

A. That is right. There was one little piece of ground left and I believe there are two appraisers that have made appraisals of Grand Canyon property, and I happen to be one of them.

Q. Now, are you familiar with the property here in issue, that is, the property that the plaintiff leased from the Tucson Airport Authority at the airport in Tucson, Arizona? A. I am.

(Testimony of J. Leslie Hansen.)

Q. Have you seen it? A. I have.

Q. Now, what steps did you take in formulating an opinion about its value in November of 1951, at or about the time when the plaintiff received notice it must vacate? [65]

A. By making comparisons with it and other property that were leased at that time, checking back as to rentals in effect at that time, with both the lessor and lessee, and comparing it in general with other properties with equal advantages and disadvantages.

Q. Now, how much square footage was involved here in the case before this Court and jury?

A. By the lease, 12,920 square feet, more or less.

Q. And you have seen that?

A. I have seen it.

Q. Was that typical factory and office space or was it better than typical or a typical, if I may use such a big word, I don't even know what it means?

A. I would say it was better than typical industrial space and not quite so good as modern office space, but certainly better than typical industrial space.

Q. Tell the jury what in your mind as a real estate expert and appraiser in the state, made it better than typical space?

Mr. Evans: If the Court please, may we have permission to ask a few questions of the witness on voir dire?

(Testimony of J. Leslie Hansen.)

The Court: Very well.

Mr. Cutler: Is that before I have completed the examination?

Mr. Evans: He asked him for an opinion.

The Court: Yes, you have asked for an opinion. I am [66] going to permit counsel at this time to ask a question on voir dire.

Mr. Cutler: All right.

Q. (By Mr. Evans): Mr. Hansen, when did you see the property covered by the lease between Tucson Airport Authority and the Worcester Felt Pad Corporation?

A. Last Friday, December 5, I believe it was.

Q. Of this year? A. The 4th. Yes.

Q. Can you state of your own personal knowledge that the property at that time was in the same condition it was in in November, 1951?

A. I can state what the authorities that showed me the property told me.

Q. In other words, on the basis of what someone told you you have figured out what it was like two years ago?

A. On the basis of what they told me and showed me as the space, this partition and that partition.

Mr. Cutler: By "they" you mean the defendant authority?

The Witness: That is right.

Mr. Evans: Is it all right if I go ahead now?

Mr. Cutler: Thank for the sarcasm. You may, if you ask my permission.

(Testimony of J. Leslie Hansen.)

Q. (By Mr. Evans): Who told you what the property was like two years ago? [67]

A. Chief Morgan of the Fire Department showed us one section and Mr. Broman, of your office, of the Airport Authority office, took Mr. Klafter and myself over there again Saturday, no, yesterday, Monday.

Q. You and Mr. Klafter were there together?

A. Yes.

Q. And did someone tell you the improvements that had been made on the property at the time it was vacated?

A. May I add something. Mr. Brauer was also with us.

Q. Mr. Brauer of the plaintiff company?

A. That is right.

Q. He also told you?

A. He showed us. Between Mr. Broman and Mr. Brauer we were shown and told what had been deleted and the shape it was, and so forth.

Q. I think you said in addition to that in your investigation to arrive at your opinion in this matter you checked back on rentals that were in existence here in 1951?

A. That is right.

Q. You checked with both lessees and lessors?

A. That is right.

Q. You mean other lessors and lessees around the city?

A. Yes, sir.

Q. Of course that goes into making up the opinion you arrived at? [68]

(Testimony of J. Leslie Hansen.)

A. That is right, a guide to forming my opinion, yes, sir.

Mr. Evans: We are going to object, if the Court please, to this witness giving any opinion as his answer discloses he is basing it at least in some portion on hearsay, extra judicial statements.

The Court: The objection will be overruled. Read him the last question.

(The last question by Mr. Cutler was read as follows: "Question: Tell the jury what in your mind as a real estate expert and appraiser in the state, made it better than typical space?")

A. I did answer the question, Counsellor. I believe that question was answered.

Q. (By Mr. Cutler): All right, I will go on to the next question. You spoke of Mr. Bowman, what is that name?

A. Broman, I believe.

Q. Who is Mr. Broman?

A. The man that apparently had the know-how to get us around without any difficulty.

Q. Isn't he Mr. Schmidt's assistant?

A. I believe he is.

Q. All right. Have you told us yet what made this space in your opinion better than typical factory or office space?

A. We have discussed that part of it very little with him. I don't believe I have told you. [69]

Q. It isn't me. Have you told the jury and the Court? A. No.

Q. Would you please, if you could, and with

(Testimony of J. Leslie Hansen.)

the Court's indulgence take a minute to tell us that, please?

A. We examined—Mr. Counsellor, may I answer the question in my own words as to the method and process of taking this——

Mr. Cutler: I will sit down.

A. We took the lease, of course, and we didn't see the original lease but we saw a copy of it and studied it and its provisions. And we looked at the space. We also looked at comparable space and compared the advantages, as I said a moment ago, and disadvantages and we find that the subject space is very desirable, in fact, it is practically office space in connection with a shop or factory type building. It has several rows of fluorescent lights; it has an overhead sprinkling system; it has wood floors; it has evaporative cooling and forced air, blower-type heating; wood floors with linoleum coverage; excellent washroom and restroom facilities. And also being located at the airport with the environment and the ability of the employees to use the lounge downstairs in the lobby and the restaurant facilities made the space very attractive from the standpoint of an employer because of the good possibilities of contented employees, and by comparison of other space without these facilities and interpolation we formed an opinion of the rental value per square foot per [70] month per year.

Q. So I reduce it now to the single question, you have formed an opinion as to the fair reasonable rental value of this space in or about the month of

(Testimony of J. Leslie Hansen.)

November or December 1, 1951, at the time the plaintiff had received on October 31, 1951, a notice to vacate in thirty days? Have you formulated such an opinion? A. I have.

Q. Please state what that is?

Mr. Evans: May the record show the defendant's objection, if the Court please, upon the ground there is no proper foundation laid, the answer is incompetent in that it is based in part on what the witness has learned by extra judicial hearsay conversations.

The Court: The record may show the objection and the same ruling.

Q. (By Mr. Cutler): Did you understand the question? A. Yes, I have an opinion.

Q. We are now up to what it is.

A. In my opinion the rental value as of that time of this space is ten cents per square foot per month.

Q. Now, extending ten cents per square foot per month by 12,920 square feet, how much is that per month?

A. We have two rates to talk about, Mr. Counsellor. We have a three year period or six year period at \$100 a month. [71]

Q. That is right. I haven't come to that. We will make the deductions later. At this time extend what you said was the fair reasonable rental value then to a monthly basis for the number of square feet. A. \$1,292 per month.

Q. If you take off the \$100 per month which the

(Testimony of J. Leslie Hansen.)

defendant agreed to pay, the difference is how much? A. \$1,192 per month.

Q. And how much is that per year?

A. \$14,304 per year difference.

Q. Now, there came a time under this lease where, after a certain number of years, the amount the plaintiff was to pay would increase slightly, didn't it? A. Yes, sir.

Q. How much did it increase by?

A. It increased by 25 per cent during the third three year period, from the sixth to the ninth year, under the options of the lease.

Q. You mean from the sixth to the ninth year in the future?

A. From the beginning of the lease.

Q. From the beginning of the lease?

A. Yes, sir.

Q. That made a difference of \$300 a year, \$25 a month, didn't it? A. That is right. [72]

Q. That still left during that third period how much difference between the reasonable rental value you found and the \$125 a month the plaintiff was required to pay?

A. \$14,004 per year.

Q. \$14,004 per year? A. Yes, sir.

Q. Did you extend that out to the term of the lease still remaining after the plaintiff was compelled to vacate by the defendant in and about December 1, 1951?

A. Did I extend it out? I didn't quite understand the question.

(Testimony of J. Leslie Hansen.)

Q. I mean did you multiply the term of the lease still to run from then on, what was it, how many years?

A. Three more years, an option for three more years at \$125 a month. It would be the same rate of difference, \$14,004.

Q. How much was left of the unexpired portion of the lease which plaintiff was entitled to by his agreement that is now in evidence, the lease agreement?

Mr. Thompson: I object to this witness testifying what is in the lease.

The Court: The objection is sustained.

Mr. Cutler: May he not say how many years?

The Court: The lease is the best evidence of that. Here is a man that has read it. The lease is pleaded, it is admitted. I believe those particular terms are admitted in the [73] answer.

Q. One more question. Will you state what the full difference is for the full unexpired term of the lease?

A. I haven't figured it in dollars and cents for the full period.

Q. All right. I will give you an opportunity to figure it. You may go ahead.

Mr. Thompson: I don't understand the last question. Will you read it to me?

(The last question was read.)

Mr. Thompson: That requires the same assumption. I assume counsel is required to get the figures

(Testimony of J. Leslie Hansen.)

from the lease himself and make the computation. He isn't competent to construe the lease at all.

Mr. Cutler: It has nothing to do with the lease.

Mr. Thompson: What period are you talking about?

Mr. Cutler: The period of the lease which you wouldn't let me tell the jury.

The Court: That is all admitted in the pleadings. This is just a matter of calculation. He has testified to the reserve rental; he has testified to his opinion of the rental value. It is a matter of calculation.

Mr. Cutler: It is admitted under the pleadings there is nine years and seven months to go on the lease and I believe I have the right to ask him to extend the nine years and seven [74] months times the number of months difference. It is a matter of calculation.

The Court: I am going to permit him to calculate it just to get it done. You can do it or if you want the witness to do it.

Mr. Cutler: I would like to have it done. Would you calculate it then, please?

The Witness: This is going to take a little longer.

Mr. Cutler: I will withdraw the question. Sometime during the progress of the trial I will calculate it and ask my opponent to stipulate it is the right calculation.

The Court: Very well.

(Testimony of J. Leslie Hansen.)

Mr. Cutler: I have completed my direct examination of this witness.

Cross Examination

Q. (By Mr. Evans): You say the space you saw there at the airport had a total area of 12,920 feet, more or less?

A. I didn't say that, sir.

Q. You didn't say that? A. No, sir.

Q. Did you see the area that Worcester Felt Pad Corporation—— A. Yes, sir.

Q. How many feet were there? [75]

A. There were approximately 11,000 or 10,000 in the area we looked at and he had additional space in another spot. We were shown two places that he had had. I quoted the 12,920 square feet more or less from the lease. That was the space available to them and he showed us the space in this bay and we checked approximately, but I am not prepared to say that I saw 12,920 square feet. I saw approximately 10,000 square feet in one bunch and was told he had additional space there are security regulations on. We didn't go every place. We had to get batches. And I saw another space in approximately the same area that he had been moved from.

Q. At what time?

A. That I can't say. That is the space the Fire Chief showed us.

Q. Mr. Hansen, you say that you can't tell us whether or not you saw all of the space that was

(Testimony of J. Leslie Hansen.)

occupied by the Worcester Felt Pad Corporation at the time they were moved out?

A. I didn't say that either.

Q. Did you see all that space?

A. I saw approximately all the space.

Q. How much of it did you not see?

A. I might not have seen 2,000 square feet, I am not prepared to say. I saw approximately the amount of area, but as to whether they had 12,920 square feet in what was shown me, I am not prepared to testify to the exactness of it. [76]

Q. You based your opinion on the value of the lease upon the assumption that everything else they had there was the same as what you saw?

A. Not on any assumption. I based my opinion of the value on the fact they had a right to 12,920 square feet.

Q. Was it covered space?

A. Under the roof, all of it.

Q. Were you told originally they had only 3,400 square feet?

A. I heard you say that today, that is the first time.

Q. You never heard that before?

A. No, sir.

Q. I will ask if that were the case, if that was the space they were entitled to under their lease, would that make a difference in your calculations?

A. No, because I read the lease. That is your statement. The lease says he had 12,920 square feet available.

(Testimony of J. Leslie Hansen.)

Q. Does it say it is covered?

A. It doesn't say it isn't covered.

Q. Does it say it is covered?

A. It doesn't say it isn't covered. When you see a lease that a man has so many square feet and you see a building where he has space, why should I assume it is anything but what the lease calls for.

Q. Normally to arrive at any opinion as an expert in a case of this type you generally like to see the space they are [77] supposed to have?

A. I did see the space they had last, Mr. Counsellor, but it was exactly 12,920 square feet, because of security regulations and all, I wanted to see the classifications, the type of space so I could make a comparison. It is up to my client to know whether or not he is paying for space he isn't using. He had available to him under the terms of the lease 12,920 square feet of space. Whether he got 9,000 or 11,000, I don't care. He had 12,920 available to him under the terms of the lease. That is what I base my calculations on.

Q. You don't know what 12,920 square feet he had available to him?

A. I saw awfully close to it in the last space he occupied.

Q. Did you see the space he occupied at first when the lease was first made, at the beginning period of the lease, commencing June of 1949?

A. I don't know whether I saw that space. I saw the space that the Fire Chief showed us, that he told us was the last space. That was when Mr.

(Testimony of J. Leslie Hansen.)

Brauer was there, because he said the Fire Chief had showed us the wrong space. And we went back Saturday to verify and find the space he had occupied last.

Q. You, of course, saw the lease?

A. I saw a copy of it in counsel's hand.

Q. And the lease described an area between columns 1 and 20, containing approximately 12,920 square feet, more or less, right?

A. I presume that is right. I don't have a copy in front of me, but I believe that is right.

Q. Let me hand this to you so we are not making any mistake about it. Handing the witness the exhibit attached to Plaintiff's complaint, which purports to be a copy of the lease between the plaintiff and the defendant.

A. Yes.

Q. Now then, did you see the property or premises between columns 1 and 20?

A. On the west side of the hangar?

Q. West side of lean-to or hangar No. 2?

A. I don't know whether I did or not.

Mr. Evans: That is all.

Redirect Examination

Q. (By Mr. Cutler): Did you see the space the plaintiff vacated in 1951?

A. I understand from the plaintiff and Mr. Schmidt's assistant, Mr. Broman and from the Fire Chief they had been moved several times, or twice

(Testimony of J. Leslie Hansen.)

prior to their going out, so I couldn't identify which particular space——

Q. Did you see the particular space in which they last were, from which they were vacated, which is involved in this lawsuit? [79] A. I did.

Mr. Cutler: That is all.

Recross Examination

Q. (By Mr. Evans): Did you measure it?

A. I paced it off, Mr. Counsellor.

Q. And came up with 10,000 square feet?

A. Approximately 10,000. That is the reason why I don't want to say I didn't see twelve or that I didn't see ten.

Q. You don't know whether, yourself, that is the same area that is covered by the lease between these parties or not?

A. I believe it is. I believe it is. I had the plaintiff there with me who told me that was the space he occupied and I had Mr. Broman, the assistant manager, who said that was the space they occupied.

Q. Let's put it a different way. You don't know of your own knowledge whether it is that portion of the second floor or the west lean-to of hangar No. 2, between columns 1 and 20?

A. I wouldn't say to that.

Q. You don't know?

A. I wouldn't say that either. They had several spaces. Under the terms of their lease they could be moved. If you read the lease further, they could be moved anywhere the airport authority wanted

(Testimony of J. Leslie Hansen.)

to move them. Now, I don't care [80] particularly whether I saw the original space as long as I saw the space that is of the type they had and the last space they occupied.

Q. But you didn't care how much area it was within a couple of thousand feet?

A. Wait a minute. I said my client was entitled to 12,920 square feet. That was up to him to see he had it. I saw the type of space he had; I assumed that was 12,920, but I am not prepared to testify on the stand that I got exactly 12,920 square feet.

Q. Wouldn't you also have to assume that the 12,920 square feet that he was entitled to at the time when he was put out was the same type of 12,920 square feet of space that he had when he originally took the lease?

Mr. Cutler: I object to that. It is not only argumentative but has nothing to do with the case. It is the space we were made to vacate. He says he saw that space. What difference does it make what he originally occupied?

The Court: He may answer. Read him the question, will you, please?

(The last question was read.)

A. No.

Q. You have covered space and uncovered space which is the more valuable or is it just exactly of the same value for the purposes the Worcester Felt Pad Corporation used it? [81]

A. Mr. Counsellor, there was no uncovered space in that there was no roof. There was space in open

(Testimony of J. Leslie Hansen.)

ranges or open parts. For instance, on one side part of the space originally had was open on the side into the hangar. I was told, I didn't see it in 1951, but I was told. And they piled merchandise up to form a wall. The space I saw now had a wall along the hangar, that is, I saw both sides of the east hangar, the east hangar or the west, I am a little bit confused. The one where the American Airlines and the restaurant are, whichever that is.

Q. East side, I believe. Wouldn't there be a difference in value between covered space and uncovered space?

A. Will you please—I am not trying to be difficult—would you explain what you mean by “uncovered” space.

Q. Didn't have a roof on it.

A. It all had a roof on it.

Mr. Evans: Read him the question before that.

(The question was read as follows: “Question: Wouldn't there be a difference in value between covered space and uncovered space?”)

Mr. Cutler: I object to that now on the ground it is immaterial. In testing his credibility they could ask, but he has already said there is no uncovered space.

The Court: No, he may answer.

A. Mr. Counsellor, without being difficult with you, would [82] you explain by “uncovered” space do you mean space in the yard as compared with space in the building?

Q. Space without a roof over it.

(Testimony of J. Leslie Hansen.)

A. That would be the yard, wouldn't it?

Q. You are the expert, Mr. Hansen.

A. I have never heard of space being called uncovered space other than in a yard. Space is space and if it has a roof over it and walls it is space, and if it is out in the open it is yard and classed at a different rate. Some of these regions we investigated had a rate of one cent per square foot for yard space.

Q. Let me ask you this. In arriving at your valuation are you assuming that the plaintiff in this case was entitled to occupy 12,920 square feet of space which you describe as practically office space?

A. I would like the clerk to read that question again.

(The last question was read.)

A. I don't think, Mr. Counsellor, in answer to your question, he was entitled necessarily to the type of space that he occupied last. Under the terms of the lease he had space in that building and I saw two classes of space, one that was almost comparable and one that was superior.

Q. You saw those loft spaces there in the hangar?

A. That is what this was. This space was all in the loft space. [83]

Q. Did you see any of the loft space that was just open out on the side?

A. Without any partitions, you mean?

Q. Yes. A. No.

Q. In other words, in arriving at your valuation

(Testimony of J. Leslie Hansen.)

of the rental value of that property in 1951 you assumed that the loft space was all enclosed, isn't that true?

A. I didn't assume. I was told it was by the assistant manager of the airport, and I so considered it was.

Q. You based your opinion on that fact?

A. Yes, sir.

Q. That it was enclosed? A. Yes, sir.

Q. If it had not been enclosed in November of 1951, would that have made a difference in your opinion?

Mr. Cutler: I object on the ground that is supposititious, nothing to do with the case, nothing to do with the facts in evidence.

The Court: No, he may answer.

A. Not necessarily, it may and may not. We took into consideration, Mr. Counsellor, its comparison as factory space compared with other factories that are around town, and we came to the conclusion we had to go to the higher rate of office rent. Some of this stuff without partitions, although [84] I didn't see any space without partitions in that loft. I didn't see open sail loft type of warehouse. And I don't know that he ever occupied it from his own statements. But if he had a space that was open like we are talking about, I believe we are talking about the same type, at least I am trying to be cooperative, on the space that was open into the side of a hangar which is open, I would say that

(Testimony of J. Leslie Hansen.)

space is less valuable than the space that is office space.

Q. How much less valuable?

A. Perhaps two and a half cents a foot by virtue of what I saw up there.

Q. You would say the space that was not enclosed would for factory purposes be worth seven and a half cents a square foot?

Q. Now you are getting me down to fine points. What do you mean by not enclosed?

Q. Open out into the hangar?

A. With no partitions at all?

Q. With no partitions furnished by the landlord?

A. But with conditions as they were in that building with the sprinkler and other emoluments I saw?

Q. Yes.

A. Yes, I would say it was worth seven and a half cents per square foot per month.

Q. For factory space or office space?

A. For utility industrial space. Like manufacturing, [85] assembling, whatever you might be calling "factory." I believe we are talking about the same thing now.

Q. Were you ever advised as to the standard published rates charged by the Tucson Airport Authority for occupancy of space at the airport?

A. I didn't seek it, sir.

Q. You did not seek it?

A. No, sir.

(Testimony of J. Leslie Hansen.)

Q. Wouldn't that be some evidence of reasonable rental value of the space?

A. No, not necessarily. It could be, but not necessarily.

Q. You feel better evidence of that would be to go into some other neighborhood and ask what space rented for in that area than at the point where the land was actually located?

A. Mr. Counsellor, we were comparing thirteen thousand, approximately, square foot area. We were not comparing five hundred thousand square foot space such as in those hangars. When a tenant makes a deal for 500,000 square feet of space it is entirely a different concept because they have all this space they will get the additional space at so-and-so. For that reason I didn't feel the rate they charged, which you quoted this morning, charged Grand Central four cents a square foot for that space was a comparable rate, because we would compare thirteen thousand, ten thousand and lesser and greater spaces and we have a thirteen thousand space tenant. [86]

Q. How far was this property from town?

A. About eight or ten miles.

Q. And with what other property did you compare it?

A. We compared it with Park Avenue Sundt stuff, Sears & Roebuck warehouse, a dozen or more.

Q. That is all located down in the industrial part of town?

A. Yes, sir. We took that into consideration, the

(Testimony of J. Leslie Hansen.)

advantages and disadvantages. We couldn't find this made—I don't want to go further than you want me to, but he didn't need any rail facilities in his type operation. It is fine for truck shipments, for labor policy, everything was in his favor for his particular type operation.

Q. Better to get help to go out eight or ten miles?

A. He got people fairly local in their location.

Q. You have been told that?

A. I suppose so.

Q. You considered what you were told in arriving at your opinion?

A. I sure did.

Q. All right, sir. Now, the rentals you checked with——

A. May I add one thing to that?

Q. Let me finish then you can. The rentals you investigated in order to arrive, or that you used in arriving at your opinion, in arriving at the value at the airport are the same as over at Park, 16th Street and 17th, and Factory Avenue, [87] which are Sundt's properties, Sears & Roebuck properties, and properties of that type, is that true?

A. No, not entirely. You are misstating part of it. You are putting straight warehouse properties in conjunction with the same field with people doing assembling and retail shipping. I took all types of property into consideration. We took these you speak of, straight warehouse. We threw out some comparable but the rate was out of line, we disregarded that one.

(Testimony of J. Leslie Hansen.)

Q. You mean if it were lower or higher either way you disregarded it?

A. No, if it were low or high for the space, not for our case, but the space under consideration.

Q. I mean if you found somebody occupying some space that seemed like too low a rental for you, you disregarded it?

A. No, not at all.

Q. Or if it was one you felt they were paying too high for you disregarded it?

A. No. You are putting a different interpretation on my statements, sir, and I can't permit that.

Q. What piece of property did you look at here in the city where they had an assembling and shipping operation of the type you were informed was operated by the plaintiff in this case?

A. I didn't find any operation I would say conformed to the [88] space operated by the plaintiff. That is what I tried to make clear in the first place. We compared the advantages and disadvantages with the space we looked over. We talked, for instance, to the owner of the paper company over here, Graham Paper Company, and he told us all the conditions of his rate. He had to build his own office space and he had his paper stock and he did his shipping from there and paid so much a square foot.

Q. What did he pay?

A. He paid five cents a square foot.

Q. Five cents. That is all.

(Testimony of J. Leslie Hansen.)

Redirect Examination

Q. (By Mr. Cutler): Did you consider that five cent space as good as this space?

A. No.

Q. Do you understand a yard, open space, to be on the second floor of a building?

A. No.

Q. Did you read the lease, which says: "****that portion of the second floor of the west 'lean-to' of said hangar No. 2, including one stairway, two toilets and one freight elevator, situated between columns one (1) and twenty (20) containing twelve thousand nine hundred twenty (12,920) square feet, more [89] or less; * * *"

A. We considered that.

Q. You didn't find any open space that has been talked about at the space rate represented by the plaintiff?

A. No, sir.

Q. Have you been paid for coming here to testify?

A. I hope to be.

Q. Have you made arrangements for what you hope to receive?

A. Yes, sir.

Q. Please state what it was?

A. I get \$100 a day.

Q. From the time you came here to look at the property?

A. For my preparation and court appearance.

Q. Is that a fair and reasonable fee for the services as given?

A. I hope everybody will consider it so, I do.
Mr. Cutler: That is all.

(Testimony of J. Leslie Hansen.)

Mr. Evans: That is all.

The Court: At this time we will take the afternoon recess. Please remember the admonition given to you before. Don't discuss the case among yourselves or make up your minds about the case.

(Recess.) [90]

MARK H. KLAFTER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Cutler): Please state, Mr. Klafter, what your business is.

A. I am a real estate broker and appraiser.

Q. And how long have you been such?

A. I have been in the real estate business continuously in Tucson since 1941.

Q. And an appraiser how long?

A. For the past eight years.

Q. Do you make your office in Tucson?

A. Yes, sir.

Q. Where?

A. At 650 North 6th Avenue.

Q. Have you always made your office in Tucson in the past eleven or twelve years?

A. Yes, sir.

Q. State with what professional associations you are affiliated?

A. I am a member of the Real Estate Board of Tucson, Arizona Association of Realtors and Na-

(Testimony of Mark H. Klafter.)

tional Association of Real Estate Boards, National Association of Real Estate Brokers. [91] I am a senior member of the Society of Residential Appraisers.

Q. Aren't you chairman of some committees on appraisal, in appraisal associations or real estate boards?

A. I have been a member of the Appraisal Committee of the Real Estate Board of Tucson since 1948. I have been chairman of that committee since 1950.

Q. During those years have you familiarized yourself with real estate, leases, fee property in Tucson, Arizona? A. Yes, sir.

Q. Including industrial, factory and warehouse and housing and other space? A. Yes, sir.

Q. Did you examine the space here in issue?

A. Yes, sir, I did.

Q. When?

A. On Friday, December 4 and yesterday.

Q. And—let's see if we can shorten it—do you agree with the statement of the previous witness as to the exceptional facilities of this particular space? A. Yes, sir, I do.

Q. Now, have you formed an opinion as to the reasonable rental value of the space which the plaintiff occupied and which the plaintiff was forced by the defendant to vacate on or about December 1, 1951? A. I have. [92]

Q. Will you give us with a reasonable degree of certainty, if you will, what in your opinion was

(Testimony of Mark H. Klafter.)

a fair and reasonable rental value of said space on or about December 1, 1951, the time plaintiff vacated?

Mr. Evans: We object to that, if the Court please, on the ground it is incompetent. There has been no proper foundation laid to show that this witness has any knowledge to the condition of the premises in 1951. He said he saw the property last week and the week before.

The Court: I think the objection will be sustained at the present time.

Q. Did you see the property the plaintiff vacated? A. Yes, sir, I did.

Q. Do you know where it is?

A. Yes, sir.

Q. Where is it?

A. It is on the second floor of the east hangar at the southern portion of the east hangar at the Tucson Airport Authority Building.

Q. What does it consist of?

A. The second floor space currently is divided up into a great number of offices, partitions of which are removable. It is space which could be used for any type of assembling or manufacturing operation or for office space.

Q. Did you confer with some representative of the defendant [93] as to whether that space is in substantially the same condition it was in November, 1951?

A. Mr. Charles Broman, who was the assistant manager of the Tucson Airport Authority showed

(Testimony of Mark H. Klafter.)

me the space yesterday and pointed out the partitions which were there when the Worcester Felt Pad Company was the tenant, and showed me the partitions which were put in place after they vacated.

Q. So that from that you were able to visualize what it was they had, the plaintiff had, from which it was vacated on or about December 1, 1951?

A. Yes, sir.

Q. What efforts did you make to find what values were, or what did you know about real estate values, including especially leasehold of comparable industrial space to this in November, 1951?

A. I went to the owners and lessees of numerous industrial and warehouse space in Tucson to find out what that type space was leasing for so that I could compare it with the subject space and make an intelligent comparison. In other words, some of it was inferior—none of it was superior.

Q. Did you confine your studies or did you include in your studies the 1951, December 1 valuation as well as present valuations?

A. Those were the only valuations I took into consideration.

Q. And in addition to that, is it not true you kept yourself [94] familiar as a live real estate broker and appraiser in the city of Tucson, Arizona, of leasehold industrial values, property similar to this, in December, 1951?

A. I was familiar with values at that time.

Q. I will repeat the question. I am repeating

(Testimony of Mark H. Klafter.)

the question, what in his opinion was a fair reasonable value in December, 1951, with a reasonable degree of certainty?

Mr. Evans: May I ask the witness one question on voir dire.

The Court: Certainly.

Q. (By Mr. Evans): In arriving at your opinion in response to the question Mr. Cutler asked you, did you take into consideration the information that you gathered from other persons not parties to this lawsuit as to what comparable facilities were renting for in 1951?

A. Did I take that into consideration?

Q. Yes.

A. I took into consideration the information the owners and tenants gave me.

Q. Owners and tenants who were not parties to this lawsuit? A. That is correct.

Q. And information which was given to you outside the presence of any officers of the Tucson Airport Authority?

A. They had nothing to do with it, naturally.

Mr. Evans: We object to it, if the Court please, on the [95] ground no proper foundation is laid. It is incompetent in that the witness indicated at least part of his opinion is based on hearsay statements made outside the courtroom.

The Court: Objection is overruled. He may answer.

A. In my opinion the space had a reasonable

(Testimony of Mark H. Klafter.)

value as of December 1, 1951, of ten cents per square foot per month.

Mr. Cutler: You may examine.

Cross Examination

Q. (By Mr. Thompson): Now, you say, Mr. Klafter, as I understand it, it was implied in one of the questions this was exceptional space. In what way did you say it was exceptional?

A. I didn't say, but I will now. It is exceptional in that it is the only space available in the Tucson area that has facilities such as second floor with wood floors, linoleum covering, wiring and conduit on both sides of the space, four rows of fluorescent light fixtures, evaporative cooling, heating facilities and the space which Mr. Broman showed me the space they last occupied which they vacated was extremely well lighted, having window walls on the south and east side.

Q. Now this space was on the second floor, was it not? A. Yes, sir.

Q. And is that the Tucson Airport, is that correct? A. Yes, sir. [96]

Q. And that is what distance from Tucson?

A. Approximately seven miles.

Q. Now, so far as office space, isn't it true, Mr. Klafter, that would have very limited use for office space seven miles from Tucson?

A. Except in connection with some manufacturing.

(Testimony of Mark H. Klafter.)

Q. It would have to be in connection with that, would it not, to be office space as such?

A. Unless the Airport Authority was successful in getting somebody to come here. If they could make this headquarters for American Airlines, something like that.

Q. In other words, if you were going to build an office space for clients, you wouldn't build it seven miles from Tucson and put it on the second story, would you, Mr. Klafter?

A. No, sir.

Q. So as office space it wasn't really very exceptionally located, was it?

A. Not as far as location goes.

Q. So far as manufacturing is concerned, of course that is better on the second floor than it is on the ground floor, is it not?

A. For some particular purposes it is.

Q. Yes. Such as?

A. Well, the operation operated by the plaintiff. It was more desirous for them to have wood floors than cement floors. [97]

Q. You can put wood floors on the ground floor, can't you?

A. It didn't happen to be available. In other words, if you offered him the same space on the ground floor he wouldn't take it. He wanted some space where he could get wood floors.

Q. But he could get it in other locations with wood floors. There are wood floors available, aren't there, in warehouses?

A. There are a few of them available.

(Testimony of Mark H. Klafter.)

Q. The fact that it was on the second floor that didn't enhance its value at all?

A. That is merely its location.

Q. What?

A. That didn't add anything to it.

Q. You say it didn't add anything to it. You don't think that detracted anything from comparable space on the ground floor?

A. I wouldn't say so.

Q. In other words, you think ordinary rentals where you have comparable space people would just as soon have the second floor as the ground floor?

A. No.

Q. Won't that enter into the value of something, whether it is more desirable or not?

A. Everything is desirable for a purpose and for his purpose it was more desirable to be upstairs.

Q. But we are talking now in one of your answers about [98] warehouse space. What warehouse space did you compare it with?

A. 19th Street, 16th Street, Factory Avenue, South Park Avenue.

Q. What did you find the average rental value of warehouse space in that area being paid in 1951?

A. From three and a half cents to eight and a half cents.

Q. From three and a half—what building pays eight and a half cents?

A. There are two of them right next to each other, one of them is Schubert Distributing. And

(Testimony of Mark H. Klafter.)

right next to the Schubert Distributing is Western Distributing.

Q. And how long have they been in business there, Mr. Klafter?

A. Well, Schubert Distributing lease was instituted January 1, 1951, and Western Distributing was approximately the same date.

Q. And what facilities do they have?

A. Four walls and a roof.

Q. What as to location, where are they located?

A. On East 16th Street.

Q. East 16th Street, on the railroad?

A. On a railroad spur.

Q. And with docks for—— A. Yes, sir.

Q. ——for trucking? [99] A. Yes, sir.

Q. Now, talking about motor vehicles, so far as trucking is concerned, is that more desirable on the second floor than the ground floor?

A. It didn't make any difference in this particular case. The Airport Authority installed and provided the tenant with an elevator to haul their stuff up and down with.

Q. Isn't it more inconvenient to take material from a second floor from an elevator and out to a truck than it would if on a ground floor?

A. It might be inconvenient.

Q. Why did you decide in the light of what you just testified that this space was worth ten cents per square foot, Mr. Klafter, in 1951?

A. Because I thought it was better than any of the warehouse space I looked at, and I thought it

(Testimony of Mark H. Klafter.)

was not quite as good as a good many of the office spaces which I compared it with.

Q. You wouldn't have paid ten cents a square foot for that as office space in 1951, would you, Mr. Klafter?

A. If I had some sort of industrial operation at the airport, I would.

Q. When you talk about value aren't you talking about what a willing purchaser and a willing renter, a landlord, would take and receive at that time? Don't you? Aren't you taking [100] those into account?

A. I do, but there is a "but" included in it and that is you have to allow for the highest and best use of the property and the highest and best use was the operation of office space in connection with an industrial operation, then I would say yes, I would be willing to pay ten cents a square foot for it.

Q. Doesn't the number of prospective tenants enter into the value of anything?

A. Certainly, the demand.

Q. The demand, yes. And you think there was a great demand for that property at ten cents a foot in 1951, is that what you mean to tell the jury, Mr. Klafter?

A. I think that was the reasonable value of it at that time.

Q. But you don't think there was any great demand for it at that time, do you?

A. There must have been.

(Testimony of Mark H. Klafter.)

Q. Did anybody ever pay ten cents per square foot for any of that property to your knowledge?

A. No.

Q. Do you know whether the owner was asking ten cents a square foot for it or not?

A. I don't know.

Mr. Thompson: That is all. [101]

Redirect Examination

Q. (By Mr. Cutler): In arriving at this valuation you took into consideration all the factors Mr. Thompson has mentioned, didn't you?

A. And some others, yes, sir.

Q. You have given us your best judgment what it was worth then when the plaintiff was vacated?

A. Yes, sir.

Q. Have you testified here voluntarily and without hope of obtaining payment for your time?

A. No, I am being paid.

Q. How much are you being paid?

A. \$75 a day.

Q. That is from the day you first worked on this?

A. That includes preparation and testimony.

Q. How many days have you been working on it? In other words, what is the amount you are going to collect from the plaintiff for your time in going through this?

A. \$350.

Mr. Cutler: That is all.

(Testimony of Mark H. Klafter.)

Recross Examination

Q. (By Mr. Thompson): May I ask one further question. How does it happen you and Mr. Hansen, I believe, came out with exactly the same [102] results, ten cents a square foot? Was that a happenstance or did you collaborate to arrive at that figure?

A. That is not a collaboration. That is my own independent——

Q. You both just arrived at that just by happenstance?

A. No, it isn't happenstance. The figures I accumulated and judgment, after weighing these figures in my judgment.

Q. And he came up and weighed the thing in his figures and both came up to ten cents a square foot? A. Yes, sir.

Q. Did you know how many square feet there were? A. In the lease?

Q. In the loft? A. Yes, sir.

Q. No, how many did you see, how many did you appraise?

A. Mr. Broman yesterday showed us a section which he said was last occupied by the Worcester Felt Pad; I asked him how long it was and he said it was 320 feet. I asked him how wide it was and he said 34 feet. That figures out to 10,880 square feet——

Q. Based on that?

A. 10,880 square feet.

(Testimony of Mark H. Klafter.)

Q. Based on what you were told by someone else, is that right?

A. The assistant manager of the Tucson Airport Authority.

Mr. Thompson: That is all. [103]

Redirect Examination

Q. (By Mr. Cutler): You are not trying to give the jury the impression that you didn't discuss with Mr. Hansen the various information you both had got together, did you? A. No.

Q. You did discuss it, didn't you?

Q. Quite thoroughly and argued about it.

Mr. Cutler: That is all.

Recross Examination

Q. (By Mr. Thompson): Just a moment. You argued about it? Was your opinion originally different from his, Mr. Klafter?

A. No, what I meant by arguing about it, I should say we discussed the matter. In his opinion one lease might have been too low and another lease might have been too high.

Q. You don't mean at first you thought it was only worth seven cents and he convinced you it was worth ten cents, or vice versa? A. No.

Q. It wasn't an argument then?

A. No. We discussed the matter.

Q. You said "argument" a moment ago, but that wasn't true?

A. It was the wrong word. [104]

(Testimony of Mark H. Klafter.)

Mr. Thompson: All right, that is all.

Redirect Examination

Q. (By Mr. Cutler): It is like a friendly argument you have with your wife, is that what you meant? A. I never win those.

Q. Neither do I. Go ahead.

Have I opponent's permission, your Honor, for them to go on about their business?

Mr. Thompson: Surely.

The Court: Very well, you may both be released.
(Last two witnesses excused.)

JULIUS BRAUER

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cutler:

Mr. Thompson: At this time we ask the defendant produce their books and records, without which we can't cross examine properly at this time and we want all their books and records. May I ask counsel to produce them now?

Mr. Cutler: I don't know of any rule that requires me [105] to produce them now. I will examine the witness and when it becomes your opportunity you may do so.

Mr. Thompson: Isn't it correct under the rules we are entitled to examine them?

The Court: Is there such a motion? There was

(Testimony of Julius Brauer.)

a motion to produce, permit inspection and copying of certain books.

Mr. Thompson: There was a motion to produce books and records.

Mr. Evans: Not at the trial necessarily.

The Court: I set that motion for hearing on Friday at 9:00 o'clock and nobody appeared.

Mr. Clampitt: May I state to the Court that at a deposition of Mr. Brauer, Mr. Brauer appeared, his deposition was taken and at that time he had the records of the Company there and Mr. Evans questioned him about it and Mr. Brauer, and the deposition will show Mr. Brauer testified from the records there. I knew of nothing further. Mr. Evans made no indication he needed anything further and I didn't appear on Friday.

Mr. Evans: That is correct, he had some records with him at the deposition.

The Court: Very well.

Q. (By Mr. Cutler): Mr. Brauer, you are president of the plaintiff, are you not?

A. Yes, sir.

Q. You were the president of the plaintiff all during the [106] time from the moment the plaintiff located a branch here until the day when you left here, is that right? A. Yes, sir.

Q. I was handed this morning about 10:00 o'clock and saw for the first time, though we have been trying to procure it for some five days, the minutes of an examination of 44 pages which the plaintiff submitted to through you as its president

(Testimony of Julius Brauer.)

by Mr. Evans, one of the counsel for the defendant, is that right? A. That is correct.

Q. You were examined, as I see from here, December 1, 1953, between the hours of 9:00 o'clock and 5:00 o'clock p.m. at the law offices of Knapp, Boyle, Bilby & Thompson, Valley National Bank Building, Tucson, Arizona?

A. No, I think it was 2:00 o'clock, wasn't it?

Q. It says nine, I don't know.

A. I think it was 2:00 o'clock.

Q. All right, whatever it was. At that examination you produced the books and records you were called upon to produce, is that correct?

A. That is correct.

Q. Now, Mr. Brauer, did you talk with somebody before this lease as to coming and locating the branch here in Tucson? A. I did.

Q. Whom did you speak with? [107]

A. I spoke first, if I remember right, to Dick Drachman.

Q. Who is he?

A. Dick Drachman is a real estate agent in the City of Tucson and an insurance, sells insurance.

Q. Who next did you speak to?

A. He recommended my calling on Mr. Goyette of the Chamber of Commerce and I also talked to Mr. Fred Stofft.

Mr. Thompson: We don't see this has any materiality. We object to it.

The Court: The objection will be sustained.

Mr. Cutler: I haven't said a word yet about

(Testimony of Julius Brauer.)

what was said, I merely wanted to show what he did. I haven't attempted in any way to modify it or change anything, I don't want to.

The Court: The objection has been sustained.

Q. (By Mr. Cutler): Did there come a time in 1951 when you received a certain letter from the defendant that is now in evidence as Plaintiff's Exhibit 5—that is changed to Exhibit 2—dated October 18, 1951, which I show you?

A. Yes, I did.

Q. Now, did you observe that portion of the letter which states—I am reading from the exhibit: “—that the Federal Government requires the use of certain covered space on Tucson Municipal Airport which includes all of the space now occupied by you.”? A. I did. [108]

Q. That statement was made by Mr. Schmidt in his letter? A. That is correct.

Q. Did you believe that? A. Absolutely.

Q. Did you believe the Federal Government was taking over this space of yours? A. I did.

Q. And believing that did you feel you had any right to interfere?

A. I did not have any right.

Q. When was it you first discovered that the Federal Government had not taken over the space, but that the Grand Central had requested the space and had leased it from the defendant?

A. I came to Tucson that year about December, the first week in December, to help move out, complete the moving of our equipment and materials.

(Testimony of Julius Brauer.)

Q. You had gotten a thirty day notice?

A. We got a thirty day notice which meant if we didn't get it out they would keep whatever was left there. So at that time I was under the impression, that is, I understood the Government was taking over the property. And I didn't realize it otherwise until some time later.

Q. About when?

A. I would say perhaps—let's see, three or four weeks possibly. [109]

Q. If I show you a letter of yours dated in January, will that refresh your recollection as to when you first found it out?

A. It definitely would.

Q. I show you a letter of January 15, 1952, and ask you if that will refresh your recollection as to the date?

A. I wrote that letter at about that time.

Q. I am talking now about when you first discovered that Grand Central had taken this over at an increased rental and that the Government, as you said you had understood, had not taken it over.

A. No, it was after this letter.

Q. How much after? Give us the date, that is what I am after.

A. I would say two or three weeks after I wrote this letter I came to them, I got the knowledge it was not the Government that took the property, but it was the Grand Central.

Q. Before you wrote this letter did you talk to anyone on behalf of the defendant?

(Testimony of Julius Brauer.)

A. I did.

Q. Whom?

A. I spoke to both Mr. Schmidt and Mr. Fred Stofft.

Q. Who is he, the latter? We know Mr. Schmidt. Who is Mr. Fred Stofft?

A. Mr. Fred Stofft was a member of the Tucson Airport [110] Authority on the Board.

Q. Meaning one of the directors?

A. I surmise he was.

Q. When you say on the board, what do you mean, the Board of Transportation?

A. No, the Board of Directors of the Tucson Airport Authority.

Q. About when was it you had that talk with Mr. Stofft and Mr. Schmidt?

A. That was during the period we were moving out of the place possibly and prior to my writing this letter of January 15.

Q. State what they said to you in substance and what you said to them in substance.

A. I came to them with the complaint that we were being forced to move and it was costing us a considerable sum of money and were they going to take care of me and Mr. Schmidt, he said, "Yes, he would because we are putting you out of the building." Mr. Stofft said, "Yes, but I don't have the authority on my own to do so. We will have to bring it up before the Board." And I suggested I appear before the Board and state my case, and he in turn suggested that I write a letter so he

(Testimony of Julius Brauer.)

could present that and they would have that to discuss and that no doubt I would get my money.

Q. And as a result of that you wrote the letter of January [111] 1/5? A. That is right.

Q. When you wrote that letter you did not then know that it was not the Federal Government which had taken over but Grand Central?

A. That is right.

Mr. Cutler: I offer the letter in evidence.

Mr. Evans: We object to it, if the Court please, immaterial, irrelevant and incompetent.

The Court: May I see it, please? The objection will be sustained.

Q. (By Mr. Cutler): Now then—I beg your Honor's pardon.

The Court: Sustained.

Mr. Cutler: I heard you. I wanted to give you an opportunity to return the letter.

Q. Was it after you wrote that letter—may that be marked for identification so we know what we are talking about?

The Court: Very well.

(Plaintiff's Exhibit 10 marked for identification.)

Q. (By Mr. Cutler): Now, after you wrote that letter did you then find for the first time that the Federal Government had not taken over but that Grand Central had for a price?

A. That is right.

Q. And did you have any talk with the defendant about that?

(Testimony of Julius Brauer.)

A. I did. I spoke to Mr. Schmidt about that.

Q. What did you say in substance to Mr. Schmidt and what did he say to you?

Mr. Evans: We object to this, if the Court please, on the ground that it is immaterial and irrelevant as to any conversations that took place after the alleged act of eviction occurred.

Mr. Cutler: They make admissions of some sort after an act of eviction or whatever else it is. Certainly he is entitled to say what happened between the defendant and the plaintiff.

The Court: The objection will be overruled.

Q. (By Mr. Cutler): Now then, do you understand the question?

A. I know the question.

Q. Then the Court permits you to answer the question if you understand it.

A. There is an article in the newspapers which stated that the Grand Central Airport rented from the Tucson Airport Authority the space we occupied plus a little extra additional space which was then occupied by the offices of the Howard Hughes, and stated they were getting a rental of thirteen or fourteen hundred dollars per month. I went to Mr. Schmidt and I said, "Is that a fact?"

Mr. Evans: Just a moment. I apparently misunderstood. Who was——

Mr. Cutler: Schmidt is talking to him. [113]

Mr. Evans: Now he said he went to Mr. Schmidt.

Mr. Cutler: No, he told that to Mr. Schmidt.

(Testimony of Julius Brauer.)

The plaintiff's president told Mr. Schmidt what he has just said.

The Witness: Yes, I saw that in the newspapers.

Mr. Evans: We certainly object to that, if the Court please, what he saw in the newspapers.

Q. (By Mr. Cutler): That I consent go out, but what did you say to Mr. Schmidt?

The Court: Just a moment. The jury will disregard the witness' statement what he saw in the newspapers.

Q. What did you say to Mr. Schmidt, that is what is binding on the defendant, not what you read in the newspaper?

A. I said to Mr. Schmidt, "I understand that the Tucson Airport Authority is receiving a rental of \$1300 or more, between thirteen and fourteen hundred, I don't recall the exact amount, for the space I had occupied."

Q. From? A. From the Grand Central.

Q. What did he say in substance?

A. He said, "That is true, excepting they were giving the additional space now being used as offices by the Howard Hughes Company."

Q. What did you say in substance?

A. I also told him, "You got yourself an increase in pay out of this, didn't you?" [114]

Q. What did he say?

A. He admitted he got the \$2,000 salary increase, and that is it.

(Testimony of Julius Brauer.)

Q. What did you say to him? Is that all you said?

A. At that time. I don't remember if I said anything after that.

Q. Did you say anything about the assignment clause in your lease? A. That is right.

Q. If that reminds you without my prodding. I am not allowed to prod. What else, if anything, was said?

A. I pointed out the fact in my lease there was a clause which said our company had the privilege of sub-letting that space, part of it or all of it to any suitable, acceptable people, and I was not given the opportunity, I was never asked, never told. I was told the Government wants the space, get out.

Q. And then after the talk with Mr. Schmidt, did you write another letter in February to the Airport Authority defendant?

A. Then I wrote a second letter in which I told them——

Q. Wait, I don't think the Court permits that and it is not fair. The letter may not get into evidence, in which event you are not allowed to state what is in it. Did you write a letter to the defendant? A. I did. [115]

Mr. Evans: February 7.

Q. (By Mr. Cutler): February 7. Now, did you on February 7 write this letter that was kindly produced by defendant's counsel from its files, to the defendant? A. I did.

(Testimony of Julius Brauer.)

Mr. Cutler: I offer it in evidence.

Mr. Evans: We object to that, if the Court please, upon the ground it is immaterial, irrelevant and incompetent.

The Court: May I see it, please? Mark it for identification first.

Mr. Cutler: Yes, please mark it for identification.

(Plaintiff's Exhibit 11 marked for identification.)

The Court: The objection is sustained.

Mr. Cutler: You see now it is a good thing you didn't say what was in the letter, it did not get into evidence.

Q. (By Mr. Cutler): Now, Mr. Brauer, how much business did your company, plaintiff, do in the first year of operations here?

Mr. Evans: May we ask the witness a question on voir dire?

The Court: Very well.

Q. (By Mr. Evans): Did the Worcester Felt Pad Corporation, Mr. Brauer, keep original books of record showing the business that was done by your company here? A. Definitely. [116]

Mr. Evans: I am going to object, then, if the Court please, on the ground those original books and records are the best evidence.

Mr. Cutler: It seems to me a president of a company knows how much business his company does and has an absolute right to say how much it does even if there are original records, especially

(Testimony of Julius Brauer.)

when he can tell to a penny how much it is and especially when he has been examined on pre-trial and told the same figures he is now going to state. The fact the original records are not here, the original records are not the only evidence. They may be some evidence. He has knowledge. He is president of the company, he has knowledge of its operations.

Mr. Thompson: The further objection, he is tending to refresh his recollection from some document he didn't make himself. It is certainly not an original record.

Mr. Cutler: If he has an accountant's report, a certified public accountant's report in front of him of his own operation to refresh his memory to the penny of the thousands he did I don't feel, at least I submit to the Court the fact he hasn't the original books here prevents him from testifying as to what business he knows the company did, if he knows. I will ask that question preliminary, if your Honor wishes me to. It seems to me that is taking a rule of evidence and torturing it beyond practical use. [117]

The Court: He testified that the company did keep books and records of the business that they did. It seems to me that would be the best evidence.

Mr. Cutler: It is not the only evidence.

The Court: Well, of course, that is always true with the best evidence rule, very frequently true there may be other evidence but the best evidence is the books and records themselves.

(Testimony of Julius Brauer.)

Mr. Cutler: Let me get at it preliminary in another way.

Q. Are you familiar with the operations of your company? A. I am.

Q. Are you also treasurer of the company as well as president? A. Yes, sir.

Q. Did you keep yourself familiar with the operations of your own company in so far as the branch here is concerned? A. I did.

Q. How much did you do the first year?

Mr. Evans: If it please the Court, we are going to make that same objection on the ground the original books and records of this plaintiff company are the best evidence.

The Court: It is the same question. The objection will be sustained.

Mr. Cutler: If your Honor will give me an exception. And that will merely mean we will have to get the books here [118] for that purpose. But I still submit I would like an opportunity, although you might not want to hear me again, maybe you are tired of hearing me altogether——

The Court: No.

Mr. Cutler: All right, thank you.

So if I ask the same question about the second year and third year I assume your Honor's ruling would be the same?

The Court: In the light of the witness' testimony that the company maintained books and records in which its volume of business was re-

(Testimony of Julius Brauer.)

corded my ruling would be as to any year and all years the books are the best evidence.

Q. (By Mr. Cutler): What books and records have you here of the company's operations in Tucson?

A. I have a copy of the complete operation with the names of every concern that we sold to and did business with from the day we came here up until the end of 1952.

Q. And is that in the form of a certified accountant's report? A. Yes, sir.

Q. And is each name set forth of every sale during the entire sale of operations from date of opening to date of closing?

A. We have the name of the customer, his address and the amount of each sale and each year in detail.

Q. Now, does that refresh your recollection as to the names of the customers and the amounts you sold here to each one? [119] A. It does.

Q. Was this accountant's report a record kept in the regular course of business which was rendered to the Board of Directors of the plaintiff corporation?

A. That is right. He heads it that way in the first page of his letter.

Q. What other records have you here?

A. We have a record of the—we have a record showing our losses sustained due to the fact that we had to get out of Tucson in such a short period—

(Testimony of Julius Brauer.)

Mr. Evans: Just a minute, Mr. Brauer. If the Court please, the witness is reading from a document which has never been identified in any way.

Mr. Cutler: Yes, he has, and he is not reading from it. He is specifying some of the things it contains. He hasn't read a word from it yet. I don't intend to get to that yet.

The Court: He can tell what records he has and describe them, whether the journal, the ledger. He can describe just by type of the book. He speaks of them as records. Let him speak of them as journal, ledger, the cash book.

Q. (By Mr. Cutler): What records of any kind relative to the operation of this business in Tucson, the branch of your plaintiff company that is suing, have you here?

A. I have the detailed reports from the certified accountants giving all the information. [120]

Q. What else have you here?

A. I do have with me copies of invoices showing the sales that were made after we were told to get out, at a loss to our company, to show they were different from what our regular prices were at the time.

Q. Now, were these records you have identified prepared regularly in the course of business by your accountants?

A. No, they were not. They were prepared so I could substantiate on my claim to the cost, whatever it was. I was not told to bring any books. I

(Testimony of Julius Brauer.)

brought no records in detail other than the book itself.

Q. Didn't you get monthly reports from your accountants? A. Oh, yes, sure.

Q. Weren't they regularly rendered in the regular course of business? A. That is right.

Q. Isn't this a consolidation of all those monthly reports together as they were kept in the regular course of business? A. That is right.

Mr. Thompson: We object to that as leading and suggestive, improper.

The Court: Sustained.

Mr. Cutler: There happens to be a statute in this state that says you can prove records that way. May I read it to you? [121]

The Court: The objection was the question was leading. The objection was sustained.

Mr. Cutler: Am I allowed to ask him if these records were kept in the regular course of business by these accountants? Anyway, that is the question I ask?

A. They were.

Q. Were the records before you a consolidation of those regular monthly reports kept by the accountants and rendered to the Board of Directors of the progress of the business?

A. Yes, sir.

Mr. Thompson: Just a moment. I object to that again. It is obviously leading, suggesting, improper. By the witness' own testimony this document be-

(Testimony of Julius Brauer.)

fore him was prepared for the purpose of this trial and not the original records of the company.

The Court: Objection sustained.

Mr. Cutler: I do not know of any rule as I read Section 1 of Chapter 62 of the laws of 1951 of the Arizona Code, there is no prohibition to him stating that any of these records kept in the regular course of business, whether original or not, can refresh his recollection as to an amount, that is all.

The Court: If he has got books and records of his company kept in the regular course of business and he establishes that, produces them, they may be offered, but as I [122] understand this thing here he has a certified public accountant who, in the course of its business, makes him a report. We don't even have those monthly reports.

Mr. Cutler: That is correct.

The Court: Now you are wanting this witness or making a statement and asking him if this is a consolidation of those. Well, I think the question is leading, I think those supplementary or regular monthly reports would have to be produced in order that anybody can test whether they are a consolidation or not.

Mr. Cutler: If your Honor please, the difficulty that I have with my understanding of what you say the law is, is this: The fact that a company keeps books doesn't mean they are precluded from proving the business they did from anything except the books. That is one way of proving it; another way of proving is if a president of a com-

(Testimony of Julius Brauer.)

pany is familiar with the business and can refresh his recollection as to the business that was done. And I never heard it said, at least I didn't, that the books are the only source of the president can say he is familiar and knows what the business of the company was. That is the point I am trying in my clumsy way to get over to the Court. I may be wrong, but that is what I think.

The Court: My view of it is this: Where a company, in the established course of its business, keeps records in which are recorded the volume of its business, those records are the [123] best evidence of the volume of business and that is the way of proving it.

Mr. Cutler: And that is the only and exclusive way in which it is proved.

The Court: That is my view of it at the present time.

Mr. Cutler: I will try my best to introduce the evidence the best way I know how, they will object and you will rule on it and we will get rid of it.

Q. (By Mr. Cutler): Are you familiar with the business your company did in Tucson in 1948, 1949, 1950 and 1951?

A. We didn't come here before 1949.

Mr. Evans: Wait a minute. We object to that upon the ground that the records are the best evidence, not what this witness is familiar with.

The Court: The present question is whether he knows, whether he is familiar. I will permit him to answer that "Yes" or "No."

(Testimony of Julius Brauer.)

Q. What is the answer? A. I am.

Q. Now, have you kept in constant touch with the operations of your business in all those years that you have been in Arizona, those three and a half or three years, including the operations in Arizona? A. I have.

Q. And do you know how much business your company did in [124] each of the years, the three years, approximately, that you were here?

A. I do.

Q. Now please state what that was?

Mr. Evans: Now then, we object to that, if the Court please, upon the ground the records are the best evidence.

The Court: Very well. The objection will be sustained.

Mr. Cutler: Very well, you will permit me my exception and I will go into something else.

The Court: It is now 4:30. At this time, Ladies and Gentlemen, we will recess the trial of this case until tomorrow morning at 10:00 o'clock. I will ask you during the recess to bear in mind the admonition heretofore given you.

(Whereupon the trial of the case was recessed at 4:30 o'clock p.m. on December 8, 1953, until the hour of 10:00 o'clock a.m., December 9, 1953.)

JULIUS BRAUER

(Resumes witness stand.)

Mr. Evans: Before we commence further examination of this witness, at this time the defendant

(Testimony of Julius Brauer.)

wishes to file with the clerk a motion to amend its answer, and may the record show a copy of the motion is handed to counsel for the plaintiff. [125]

The Court: I will hear you on this at the recess.

Mr. Cutler: You will hear us both, sir?

The Court: Yes.

Mr. Cutler: If your Honor please, yesterday we were on the subject of profits and business, and so forth, and your Honor ruled that the books were the best evidence and that the president of the company could not testify as to that situation without the books, which were the best evidence. Therefore on that ruling I am withdrawing that portion of our claim which relates to that difference in profits, and I am relying solely upon the difference between the rental value and the lease price for the nine years and seven months during the period still to go on the lease. And for that purpose I would like the defendant to concede the following figures:

The experts' valuation of ten cents a foot is \$1292 per month, that is ten cents per foot, 12,920 feet of space. That comes to \$15,504 per year. That if you make the appropriate reductions for the six years of the lease in which the plaintiff had to pay \$125 a month instead of \$100 a month, and if you extend the \$15,504 out to the nine years and seven months you get a difference between the lease agreed price of \$100 and \$125 per month respectively, and the valuation of the property at the time of the ouster, as testified to thus far by the experts,

(Testimony of Julius Brauer.)

that the difference I am going to ask for as the damages and the only damages the plaintiff claims in this [case] are \$135,280.

The Court: Do you have any further questions?

Mr. Cutler: Oh, yes. Of course I will give him a chance to consult it. I don't ask for any such concession now but that is the way I have computed it.

Q. (By Mr. Cutler): Now, Mr. Brauer, did you rely upon the statements made to you by Mr. Schmidt on behalf of the defendant that the Federal Government was taking over the property and not Grand Central? A. I did.

Q. Had you known that Grand Central was taking over the property at a greatly increased rental, your property, would you have consented thereto?

A. We would not, no.

Q. When you were told that the Federal Government was taking over the property you believed that it was recapturing the property free, did you not? A. That is correct.

Mr. Evans: We object to the leading and suggestive character of the questions.

The Court: It is leading.

Mr. Cutler: Yes. Please forgive me.

Q. What did you believe when you read in Mr. Schmidt's letter that the Federal Government was taking over the property?

A. That the Government was stepping in and taking over the [127] entire property at the airport and according to our lease that meant they

(Testimony of Julius Brauer.)

were taking over the original lease information, which meant they had a right to come and take the place over at no cost to them and we could have no recourse for any expenses we might have had.

Q. You had no knowledge, then, that the Grand Central was paying for your space a rent far in excess of what you were obliged by your lease to pay?

A. Not until I saw it in the newspapers.

Q. That, you told us, was the following February when you wrote the letter that is in evidence?

A. That is right.

Q. But at this time——

The Court: That letter was not admitted in evidence.

Mr. Cutler: You are right. That was a letter marked for identification.

The Court: I believe it is No. 10.

Mr. Cutler: The one I am referring to is 11. What I meant to say, not in evidence. I meant to say at the time you wrote your letter of February 7, which is merely marked for identification as Plaintiff's Exhibit No. 11, is that right?

A. Yes.

Q. So that when you received a letter in October giving you the notice by Mr. Schmidt, which is also in evidence, so that [128] when you received the registered letter of October 18, 1951, from the defendant, signed by Schmidt, giving you thirty days notice to move, at that time you believed his

(Testimony of Julius Brauer.)

statement that the Federal Government had taken it over?

Mr. Thompson: Just a moment. We must object to the leading and suggestive questions.

Q. (By Mr. Cutler): Did you believe this statement? A. Yes.

Mr. Thompson: It is still leading and suggestive, if your Honor please. He can ask him what he believes, I suppose, but to suggest to the witness what he believes is improper.

Mr. Cutler: I don't think it is leading to say "did you believe."

The Court: You can ask him for his belief.

Q. (By Mr. Cutler): Did you believe the statement that the Federal Government was taking over? A. I absolutely did.

Q. Did you rely upon it? A. I did.

Mr. Cutler: You may examine.

Cross Examination

Q. (By Mr. Evans): Mr. Brauer, how long have you been president of Worcester Felt Pad Corporation? [129]

A. Since its inception, close to twenty-five years.

Q. And the company was originally formed in Massachusetts, is that correct? A. Yes, sir.

Q. And you had a plant in or near Worcester, Massachusetts, at all times since the company first commenced doing business? A. We did.

Q. What is the nature of that business or the business done by Worcester Felt Pad Corporation?

(Testimony of Julius Brauer.)

A. We manufacture household items used in the kitchen and laundries of homes, such as, let's see, laundry bags, ironing board pads, ironing board covers, garment bags, shoe bags.

Q. And what was the nature of the operations of the Worcester Felt Pad Corporation at its plant in Tucson? A. The same type work.

Q. Manufacturing those same items?

A. With a few exceptions.

Q. But in substantially the operations here encompassed the manufacture and sale of the same items that were made by the company at its Worcester, Massachusetts plant? A. Correct.

Q. When did you first commence manufacturing and selling those items from the Tucson plant?

Mr. Cutler: I object on the ground that it is immaterial and irrelevant, and at this time not part of the plaintiff's [130] case, cross examination not relevant to the issues that I had brought out. And also upon the ground you have already held none of the conversations and other things were admissible, that the lease spoke for itself, and all the rest that goes with it.

The Court: He may answer. Objection overruled.

Mr. Cutler: Exception, please.

Mr. Evans: Would you read the question, please?

The Witness: I think I know the question. You asked when we started operating.

Mr. Evans: He will ask it, I don't recall.

(Testimony of Julius Brauer.)

(The last question was read as follows:

“Question: When did you first commence manufacturing and selling those items from the Tucson plant?”)

A. That would be about six months, I think, after we signed the lease, around that time.

Q. When did you first take possession of the premises covered by the lease, Mr. Brauer?

A. We took that immediately.

Q. And started setting up your manufacturing equipment?

A. Well, no, because when we first took it over we had one hundred per cent in my own mind I didn't know what I was going to do with it.

Q. Just a moment. Mr. Brauer, you signed the lease March 1, 1949? [131] A. Yes.

Q. And the lease was executed by you as president of the Worcester Felt Pad Corporation?

A. Correct.

Q. At the time that the lease was signed you were, of course, duly authorized by your company to enter into that lease? A. I was.

Q. And at the time the lease was signed the Worcester Felt Pad Corporation intended to take possession of the premises described in that lease?

A. Well, I say yes, we were going to take possession of it.

Q. And you did take possession of it right after the lease was signed? A. Yes.

Q. And continued to retain possession of it until the Worcester Felt Pad Corporation removed

(Testimony of Julius Brauer.)

from the premises some time in December of 1951?

A. Right.

Q. Are you able to tell us the exact day you moved out in 1951?

A. No, because according to the notice we had thirty days, we pleaded for an extension so it would give us a chance to look for some other place, plus the fact we couldn't get out so quick. And I think we got an extension of fifteen days and [132] it must have been by December 15 or 16 we were out of there.

Q. You eventually commenced to manufacture these items for sale at the Tucson operation or at the Tucson plant of Worcester Felt Pad Corporation?

A. Yes.

Q. And all the operations conducted on the premises originally leased by the Worcester Felt Pad Corporation was conducted by the Worcester Felt Pad Corporation?

A. No, wait——

Q. Is that true?

A. Go over that again.

Q. I say the operation, the manufacture and sale of the items manufactured at the Tucson plant was done by Worcester Felt Pad Corporation?

A. No, we had someone else in there.

Q. Tech Toys, Inc.?

A. That is right.

Q. That was an assembly operation of plastic toys?

A. That is right.

Q. At the same time the Worcester Felt Pad Corporation, at the same time in a portion of the

(Testimony of Julius Brauer.)

premises covered by the original lease, was manufacturing and selling these items of household or kitchen, laundry use you have described?

A. Yes.

Q. You continued doing that until the time that the Worcester [133] Felt Pad Corporation removed from the premises there? A. Yes.

Q. As I understand it, you were engaged in business there for a total time of about two and a half years? A. That is about right, yes.

Q. And you say you vacated the premises about the 15th of December, 1951, 15th or 16th?

A. Yes.

Q. Then you were only in the premises a total of about two years and nine months from the time your company first took possession of the property?

A. No, I don't think we started to pay rent until perhaps, oh, two or three months after we signed the lease.

Q. That is right, 1st of June, 1949?

A. That is right.

Q. But you took possession of the property before that, which you had the right to do under the lease? A. Sure.

Q. You started installing equipment that was to be used subsequently in the manufacture of these products?

A. That was about June that you state there.

Q. About the time you started paying rent?

(Testimony of Julius Brauer.)

A. That is right, that is when we started putting our machinery in there.

Q. There was no machinery you say on the premises covered [134] by this lease that was owned or purchased or being purchased by the Worcester Felt Pad Corporation before the 1st of June, 1949?

A. No, I wouldn't say that.

Q. When was it first installed?

A. I can't give you a definite date on that. I would say somewhat prior to that, perhaps a month or so or perhaps less than that.

Q. Now, the lease you signed on behalf of your company was to your way of thinking a very reasonable rent, isn't that true? A. Yes.

Q. And I believe you have considered it as about the lowest rent imaginable for that type space?

A. That is right.

Q. And that is the reason you came out here and entered into that lease, was it not, because it was such a low rent for that type space?

Mr. Cutler: That is unimportant. I beg your pardon. The lease speaks for itself. The fact that he got a low or cheap price is of no importance. And what he had in his mind with reference to that is also of no importance because he is entitled to the benefit of his bargain.

The Court: He may answer.

(The last question was read.) [135]

A. That is right.

Q. And the additional reason you came out here and took that lease was to facilitate the business of

(Testimony of Julius Brauer.)

Worcester Felt Pad Corporation in distributing or selling the items manufactured by Worcester Felt Pad Company in the western part of the United States?

Mr. Cutler: I object upon that his reasons for taking the lease are wholly immaterial, irrelevant and incompetent at this state of the record. That whatever his reasons were the lease speaks for itself and you have prohibited me from mentioning anything that happened prior to the signing of the lease. Even on cross examination his reasons are immaterial.

The Court: I don't agree with your statement I prohibited you from showing anything that happened prior to the lease.

Mr. Cutler: I mean any conversations that happened, or anything that motivated him.

The Court: No. I made rulings on specific objections.

Mr. Cutler: I don't mean to characterize what happened, but my point is that obviously the lease speaks for itself, that his reasons for taking the lease on this state of the record are of no importance. That the man is entitled to the lease provisions which are in writing, and that whatever his reason was is immaterial. A man's motives in a civil case [136] have nothing to do with the question. He is entitled to the benefit of his lease and his reasons are not important or not relevant.

The Court: I am going to permit him to answer it, being cross examination.

(Testimony of Julius Brauer.)

Mr. Cutler: Your Honor will permit me an exception?

The Court: There is no necessity for exceptions, Mr. Cutler. There is an automatic exception to every ruling.

Mr. Cutler: Then I will not trespass on that.

(The last question was read as follows:
“Question: And the additional reason you came out here and took that lease was to facilitate the business of Worcester Felt Pad Corporation in distributing or selling the items manufactured by Worcester Felt Pad Company in the western part of the United States?”)

A. No, not entirely, because I had other reasons in mind.

Q. One of the main reasons why you were favorable in opening up the plant of the Worcester Felt Pad Company in Tucson is that you received favorable or speedy delivery of your items being sold by truck to the distributing points in the west?

Mr. Cutler: I object to the reasons that motivated him in signing the lease.

The Court: He may answer.

Q. (By Mr. Evans): Isn't that true? [137]

A. That was part of the answer after I got started, yes.

Q. That was the biggest item and one of the reasons you were favorable to opening up the plant?

Mr. Cutler: I object to characterizing “biggest,”

(Testimony of Julius Brauer.)

“main,” or other reasons on the ground that isn’t proper cross examination.

The Court: Objection overruled.

Q. Isn’t that true?

A. Let’s word it again.

(The last question was read.)

A. My final decision was afterwards to do that.

Q. In other words, you say that was the biggest item in your decision to open the plant?

A. That was one. I don’t say that was the biggest.

Q. You recall the occasion your deposition was taken on December 1, 1953, in this matter, do you not? A. Yes.

Q. And you recall your giving this answer, Mr. Brauer?

Mr. Cutler: This answer to what?

Q. To this question. Starting on page 36 at line 24—better start up at line 18:

“Question: What I am getting at is to what do you attribute the increase over ’48 when you didn’t have the Tucson plant and ’51 when you hit the high point during the time you were operating the Tucson plant? [138]

“Answer: I got a very good——”

Mr. Cutler: Wait a minute. I don’t think you are allowed to read the answer if the question is objectionable, are you?

Mr. Evans: I don’t really want to ask him about that, if the Court please, but the next question or

(Testimony of Julius Brauer.)

the next answer and the following question doesn't make sense without it.

Mr. Cutler: That doesn't get an incompetent question in if it be ruled by the Court to be incompetent, does it? I believe the proper practice is, if an objectionable question is asked an objection is made before the answer is read. Am I wrong about that? Anyhow, I object to this question upon the ground, first, it is not proper cross examination; second, it is on a subject that has already been withdrawn from the lawsuit, the increased profits, and so forth and so on, and, third, upon a question which your Honor has not allowed him to testify orally, holding that the books were the best evidence.

The Court: I take it this is being asked for the purposes of impeachment?

Mr. Evans: Yes, sir. The particular point is brought out in that portion of the answer commencing on line 3, page 37 of the deposition.

Mr. Cutler: Even impeachment, if it is impeachment of something that is not in the case or that was not ever allowed [139] in the case and when in pre-trial the defendant thought it would be in the case but it is now out of the case and has never been testified to. It cannot be impeaching testimony.

The Court: The question answer may be on regard to some matter not presently in the case, but it may impeach on some material matter, I don't know.

(Testimony of Julius Brauer.)

Mr. Cutler: The best we can do is let it be read.

The Court: And then I will rule on it.

Mr. Cutler: Thank you, sir.

Q. (By Mr. Evans): "Answer: I got a very good answer for you.

"Question: Good.

"Answer: Business conditions today are such that the jobbers and stores do not want to keep big inventories. When they buy from the East it takes it so long to get here that they have to buy in larger quantities. The biggest item and one of the main reasons why I was favorable to opening up the plant here in Tucson was I was shipping out of Tucson with the cooperation of the trucking company. We were getting an order out of Los Angeles which came in, let's say, on a Monday, they had it in their stores by Wednesday. We had two days delivery to San Francisco; we had two days delivery into Texas; we had, I think, three days into the Denver area, Portland, Oregon took longer. It had to have a transfer point in San Francisco, Oakland was the transfer point. The minute we—
[140] of course the minute that we stopped we started to lose out again."

Do you recall those questions being asked you and you giving those answers?

A. Yes, I do.

Mr. Cutler: Wait a minute.

The Court: Mr. Witness, your counsel is endeavoring to object and when he makes an objection please don't answer.

(Testimony of Julius Brauer.)

Mr. Cutler: I object to this question and answer upon the ground that it is not impeaching testimony.

The Court: The objection will be sustained.

Mr. Cutler: And I ask your Honor to ask the jury to disregard the reading and answering of that question.

The Court: The jury will, of course, disregard the question and answer just read by counsel, please. The objection is sustained to it on the ground it is not in the case for any purpose.

Q. (By Mr. Evans): Now, it was along in the early part of the year 1949 when Worcester Felt Pad Corporation commenced considering the opening of a western branch plant?

Mr. Cutler: I object on the ground that is wholly immaterial in this lawsuit and the present state of the proceedings.

The Court: I don't see the materiality of it at this stage. Objection sustained. [141]

Q. Now, Mr. Brauer, did the Worcester Felt Pad Corporation, to your knowledge, ever qualify to do business in the State of Arizona?

Mr. Cutler: Objected to as immaterial, irrelevant and incompetent, has nothing to do with the issues, not pleaded, not in the case.

The Court: The record would be the best evidence in any event.

Q. (By Mr. Evans): When did you come out here, Mr. Brauer, after receiving the letter from Mr. Schmidt of October 15, 1951?

(Testimony of Julius Brauer.)

A. I think the second week in December.

Q. The second week in December?

A. That is right.

Q. You arrived here at a time prior to the date upon which the Worcester Felt Pad Corporation vacated the premises at the airport?

A. Final vacating. We were shipping right along.

Q. But before you were actually out of the airport premises completely you had arrived in Tucson? A. Yes.

Q. And during all of the time from the date that the notice was received, the notice from Mr. Schmidt dated October 15, 1951, and the time you arrived here, you had a manager of the Tucson plant here and a person who was in authority for the [142] Worcester Felt Pad Corporation?

A. In its operation only.

Q. That was Mr. Alpert? A. Mr. Alpert.

Q. And after you received the letter of October 18, 1951, from Mr. Schmidt, did you at any time inquire of Lieutenant Colonel Pattillo, or rather of the officer in charge of the Air Force Plant Office, Grand Central Aircraft Company, Glendale Region, Western Air Procurement District, concerning the request of that officer for the space of the airport?

A. I personally? I don't think so.

Q. Did anyone on behalf of the corporation to your knowledge?

(Testimony of Julius Brauer.)

A. Unless I am refreshed it may have been our attorney in Worcester. I wouldn't know offhand.

Q. Did you or to your knowledge anyone, any officer of the Worcester Felt Pad Corporation, at any time between the date that you received Mr. Schmidt's letter of October 18, 1951, and the time you vacated the premises at the airport, contact the chief of the airport division, Civil Aeronautics Administration, Los Angeles, with respect to the actions of the Government in connection with the property there at the airport?

A. Any letters of those sorts would come from our attorneys, I wouldn't know.

Q. You have no knowledge of it? You yourself as president——

A. At that time. Well, at that time, no. [143]

Q. That is what I say, between the date you received the letter and the date you moved from the property?

A. No—wait a minute, let me qualify that perhaps. Those letters, the correspondence, let's say of our attorneys, I think that is what you are referring to, correspondence of attorneys.

Q. My question was did you yourself, Mr. Brauer? A. No, I myself didn't.

Q. Or to your knowledge did any officer of the Worcester Felt Pad Corporation do that?

A. No.

Q. You say when you received the letter from Mr. Schmidt you thought the Government was taking over the entire airport?

(Testimony of Julius Brauer.)

A. That is right.

Q. And do you recall the letter from Mr. Schmidt dated October 18, 1951, which is in evidence in this case as the Plaintiff's Exhibit 2 in evidence, in which you were advised that the Federal Government requires the use of certain covered space on Tucson Municipal Airport?

A. Yes.

Q. You read that, of course?

A. Yes, sure.

Q. But notwithstanding the use of language "certain covered space at the airport," you assumed the Air Force was taking over the entire airport, is that true? [144]

A. Because we had other information besides that letter.

Q. On October 18? A. That is right.

Q. What other information did you have at that time, Mr. Brauer?

A. We received a telephone call from Mr. Alpert.

Q. You say "we," you mean Worcester Felt Pad Corporation?

A. That is right. We received a telephone call from Mr. Alpert here in Tucson, telling us—

Q. Just a moment. I am not going to ask you what he told you unless Mr. Schmidt or someone was on the phone which I assume he wasn't?

A. No.

Q. That was a day or so before you received the

(Testimony of Julius Brauer.)

registered letter, which is in evidence as Plaintiff's Exhibit 2? A. Yes.

Q. I believe you said, Mr. Brauer, on direct examination that it was after you wrote the letter to Tucson Airport Authority, January 15, 1952, that you learned for the first time that Grand Central Aircraft Company was taking over the space that had been occupied by you?

A. No, I don't think I said that. If I did, I didn't mean to put it that way.

Q. It was my understanding, and correct me, sir, if my understanding is wrong, but is my understanding your testimony [145] was to the effect that you wrote two letters to the Tucson Airport Authority, is that correct? A. Yes.

Q. And it was my further understanding that you testified that at the time you wrote the first letter you did not have knowledge that Grand Central was taking over the property.

A. Let's see how that is worded.

Mr. Cutler: Let's find out what the letters are first.

The Witness: I have an idea, Counsellor, if I can get the wording properly in my mind. The first letter was written——

Q. (By Mr. Evans): I believe you testified on January 15? A. You have the letter.

Q. Yes, sir. A. At that time——

Mr. Cutler: Wait a minute. That letter we offered in evidence and on their objection it was refused.

(Testimony of Julius Brauer.)

Mr. Evans: That is correct.

Mr. Cutler: All right. Then I object to any interrogation about the letter which is not in evidence.

The Court: No, he is only fixing a date, as I understand it.

Mr. Evans: That is right, using it as a reference date.

The Witness: Shall I continue?

Q. (By Mr. Evans): Yes, sir.

A. We knew according to the newspapers that the Grand [146] Central was leased the space, but still I thought it was the Government acting.

Q. When did you first know Grand Central was leasing the space?

A. From the newspapers.

Q. When was that?

A. It was prior to that letter.

Q. Prior to which letter?

A. The one you just read to me.

Q. Prior to the letter dated January 15, 1952?

A. That is right.

Q. I think you told us, Mr. Brauer, that from the time you commenced operations of the Worcester Felt Pad Corporation in manufacturing and selling these items that were manufactured by it at the Tucson plant, that you continued doing business in that same manner until your lease was terminated and you moved from the airport premises?

(Testimony of Julius Brauer.)

Mr. Cutler: Wait a minute. May I hear the question, please? I was inattentive, forgive me.

(The last question was read.)

Mr. Cutler: No objection.

A. That is what I said.

Q. (By Mr. Evans): And the Worcester Felt Pad Corporation had begun considering the opening of a western branch plant of your company along in January or so of 1949?

Mr. Cutler: I object upon the ground it is immaterial, not binding on anybody, asking for an operation on the part of the mind of the witness.

The Court: The objection will be sustained.

Mr. Cutler: Pardon?

The Court: The objection will be sustained.

Mr. Cutler: I beg your pardon, I didn't hear you, sir.

Q. (By Mr. Evans): I believe you testified as to a conversation with a Mr. Stofft, Mr. Fred Stofft, Mr. Brauer?

A. Prior to coming, or what?

Q. After you had removed the operations of Worcester Felt Pad Corporation from the Tucson Airport?

A. Yes.

Q. And where did that conversation take place?

A. In his store.

Q. Who was present?

A. No one.

Q. Just the two of you?

A. That is right.

Q. What was that conversation?

A. In effect that——

(Testimony of Julius Brauer.)

Q. No, are you able to relate the conversation as to what you said and what Mr. Stofft said?

A. I can't give it to you word by word, I can give you the gist of it. [148]

Q. Then give us your best recollection of the conversation, what was said by you and what was said by him.

A. That I felt inasmuch as the Government took over the airport and we had quite an expense coming into Tucson and moving out of Tucson, that we should, if it is fair to all concerned, be paid for our expenses. That they, Tucson Airport Authority, was going to receive more money for their space from the Government, that is rather from Grand Central when the Government took over, and under those conditions I expected they would do something for us toward paying us. Mr. Stofft said, "I believe you are right. You are entitled to it in my opinion and give me the detailed figures." I said, "I will appear before your Board and give them my story." And he said it wouldn't be necessary, "If you will give it to me, write it out, give a resume of what you think your costs were I will present it to them." Which I did.

Q. That is about all the conversation?

A. That is right.

Q. Now, I think you said you had a conversation with Mr. Schmidt then later on too?

A. Practically on the same. Mr. Schmidt was of the opinion I ought to be paid for my expenses.

Q. Was there anything in the conversation you

(Testimony of Julius Brauer.)

had with either Mr. Stofft or with Mr. Schmidt about the amount of rental that was being paid by the Grand Central Aircraft [149] Corporation?

Mr. Cutler: I object upon the ground that I attempted to introduce the letter in evidence, they objected. It isn't here; he is now asking for a conversation.

The Court: No, this is a conversation upon which he testified on direct examination.

Mr. Cutler: All right, I beg your pardon.

The Court: Now counsel is asking him something further.

Mr. Cutler: The objection is withdrawn, sir.

The Court: Very well.

The Witness: What was it now? I just said I told it to Mr. Stofft and I also told it to Mr. Schmidt.

Q. (By Mr. Evans): About the amount of rental Grand Central was supposedly paying for the space you had formerly occupied?

A. That is right. It was in the newspapers.

Q. I asked you did you talk to them about that?

A. Yes, that is right.

Q. When did this conversation take place with Mr. Schmidt?

A. Prior to my writing that letter.

Q. Which letter? A. You referred to.

Q. The first letter? A. First letter.

Q. January 15th?

A. That is right. [150]

Q. 1952? A. Yes.

(Testimony of Julius Brauer.)

Q. Where did that conversation take place?

A. At the airport.

Q. In Mr. Schmidt's office? A. Yes.

Q. Was there anyone present besides you and Mr. Schmidt?

A. There was someone in his office. I don't think they were in on the conversation, I don't know.

Q. Can you relate that conversation to the best of your recollection and ability, what you said and what he said?

A. Yes. I said, "I see where the airport is making a good deal on this property. The paper says you are getting \$1300 for the space I occupied and also says you are getting a \$2,000 increase in pay." And he smiled and said, "That is true." But we didn't go any further from that and what I was interested in was getting some money for my expenses.

Q. Did Mr. Schmidt tell you when he had received this increase in pay?

A. I accepted what I saw in the newspapers and he didn't say when.

Q. He didn't tell you when. He didn't tell you he had received it in January of 1951?

A. No, he didn't say. We didn't speak of that.

Q. Do you recall, Mr. Brauer, what newspaper you saw this article in that you are referring to from which you obtained this information?

A. Either the morning or afternoon paper. I would surmise it would be in the morning because the meetings are usually held in the afternoon.

(Testimony of Julius Brauer.)

Mr. Evans: Nothing further.

Mr. Cutler: Nothing further.

ROBERT J. ALPERT

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cutler:

Mr. Cutler: May I proceed, sir?

The Court: Surely.

Q. Mr. Alpert, you are the son-in-law of the previous witness, Mr. Brauer?

A. That is correct.

Q. Were you the person in charge of the plant in October, November and December, 1951?

A. I was.

Q. I mean of course the plaintiff's plant in Tucson here at the airport. Now, did there come a time when you received this letter of October 18 from Schmidt, of the defendant, now [152] in evidence as Plaintiff's Exhibit 2? A. Yes.

Q. Did you believe the statement in there that the Federal Government had taken over the property? A. Yes, I did.

Q. I neglected to ask you, when did you first come here with reference to the Worcester Felt Pad plant in Tucson?

A. It was some time in March of 1949.

Q. And are you an officer of the plaintiff?

A. I am not.

(Testimony of Robert J. Alpert.)

Q. And never were? A. Never were.

Q. I believe you are not working for the plaintiff any more and haven't been since the time you left here? A. That is correct.

Q. Now, did you rely upon the representation that the Government had taken over?

A. I did.

Q. And when I said "Government" taken over did you believe anything with reference to whether the Government was paying for it?

Mr. Evans: I believe this is all immaterial in view of the witness' testimony he was not an officer of the company, if the Court please, and object to it on that ground.

The Court: The objection will be sustained.

Mr. Cutler: You may examine.

Cross Examination

Q. (By Mr. Evans): You were on the payroll, Mr. Alpert, of the Worcester Felt Pad Corporation from the time you came here in March of 1949 until you left along in December, 1951?

Mr. Cutler: I object as immaterial, irrelevant and incompetent, having nothing to do with the issues in this case.

The Court: He may answer. A. I was.

Q. Your employment was as manager of the Tucson operation of the Worcester Felt Pad Corporation? A. That is correct.

Mr. Evans: That is all.

Mr. Cutler: That is all.

JAMES L. PATTILLO

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Cutler): Colonel, with apologies for keeping you here since yesterday, perhaps I have arrived at a point where I can get [154] some testimony in I couldn't get in yesterday. I said perhaps.

Did you on behalf of the Army, the Air Force, ask for this airport property or did Grand Central request you to ask for it?

Mr. Evans: We object to that, if the Court please, upon the ground it is immaterial, irrelevant and incompetent. There is a letter of request that is in evidence and it speaks for itself.

The Court: The objection will be sustained.

Mr. Cutler: If your Honor pleases, would you hear me now. If we are going to have that on the next two questions you know what they are. I would like to be heard if I could.

The Court: We might take the morning recess at this time and I can hear you. At this time we will recess for twenty minutes. We will recess until 11:20. I will ask you to bear in mind during the recess the admonition heretofore given you.

(The jury retires from the courtroom.)

Mr. Cutler: Yesterday you were kind enough to indulge me by listening to my discussion about whether Pattillo's testimony could come in first or whether I could make an avowal of what I proved,

then you would have received it. I of course being an officer of the Court, wasn't sure I could make such an avowal and I did not make it. And you then ruled in the absence of some testimony showing the knowledge of Schmidt [155] you would not accept the lack of authority and the other two things, one was lack of authority and the second was the request, and the third was he had nothing to do with civilian work. I then argued that I had the right to introduce the fact first, the fact being, one, that the Army or Air Force did not request it, Grand Central did, and they acted favorably or helped them; two, that this man had no authority; three, this was not an Army directive, and, four, this was not any interference, which he had no right to do, with civilian production.

I then contended that I had the right to prove that fact first, and you disagreed with me, so I had to abide by your ruling. Since then the record has changed. I have established, I believe, at least sufficiently to go to the jury, I think I have established definitely that Schmidt knew this man had no authority, that Schmidt knew that Grand Central had requested and the Army had not requested, and the other items. So that if I understood your ruling I believe the testimony which you ruled yesterday was inadmissible now become admissible. But I want to go a step further. I argued yesterday in my general ignorance of the law that a fraudulent statement is just as fraudulent if made by the defendant, whether it be made with knowledge of its falsity or it be made without knowledge of its

falsity, that a defendant has no right to make a false statement in order to induce [156] another party to do something; and that the falsity of the statement is the immediate concern and not whether or not he knew of it. I cited a case to you, which you say you have read. It seems to me a very simple proposition. If you come in to visit me in my junk yard and there is a heap of slag there, and you say, "What do you want for it, \$100?" And I say, "You can have it." That is a good contract, a valid contract. If, on the other hand, I say to you: You know that pile of slag is sixty-two per cent copper, nineteen per cent lead and various other components to make up the one hundred per cent, and I induce you thereby to pay me that \$100, that is fraud, even though I didn't know what the contents of the slag heap were at the time I made it. But whether or not there was knowledge, I think was unimportant, and I thought so yesterday. But now I believe we have arrived at the point where Pattillo's testimony becomes material, because we have proved from the mouth of the defendant they knew he had no authority.

Now, if your Honor please, one more minute and I thank you for your patience and courtesy to me. So much was talked about from the day we were boys. "The letter speaks for itself." That's a misnomer in our legal work and it is a fiction. A letter speaks for itself where it is between two contracting parties, but it does not become so inviolate where it is letters exchanged between others who are not higher [157] contracting parties. You held

yesterday that the letter of the Government speaks for itself. I respectfully submit to you that such a letter doesn't speak for itself. It was not addressed to my client, it was addressed to the defendant. The defendant not only did that, but he went much further. He made an absolute misrepresentation in writing, as a result of which he led my client to believe that the Government took it over without cost, whereas, he knew in truth and in fact that the Government had not taken over but that Grand Central did take over. And furthermore, he went to the length of concealing from my client the letters of the Government, but merely spoke of a letter of September 26 and concluded and characterized that letter absolutely untruthfully. And that is one of the gravamens of our cause of action. Under those circumstances I respectfully submit I am entitled to go into the factual question: Did Pattillo have the authority; was it a directive; did he have anything to do with civilian work. And that is why I believe we have arrived at a different place than we were yesterday. Therefore we submit this testimony is admissible.

Mr. Evans: If it please the Court, the fact still remains the only basis, proper basis upon which the questions propounded to Lieutenant Colonel Pattillo would be admissible in this matter would be if it could be shown by the plaintiff that Mr. Schmidt or some officer of the Tucson Airport Authority [158] had knowledge of those matters. Now, there is certainly no evidence in the record at this time, the direct question was put to Mr. Schmidt and he

responded to it "No," he did not know, and it seems to me——

Mr. Cutler: He did not know? He said he had no authority.

Mr. Evans: That he did not know whether Grand Central had requested or the Air Force, that he did not know whether Colonel Pattillo had the authority or did not have any authority.

Mr. Cutler: I have his sworn testimony he did know that they didn't.

Mr. Evans: At the time of September 26 or on October 18.

Mr. Cutler: All right.

Mr. Evans: Subsequently, I believe the testimony discloses that he did find out, and in Mr. Schmidt's words, my recollection of it, a considerable period of time after the plaintiff had moved from the premises.

Mr. Cutler: Now may I take another half moment with your indulgence. This is a fraud action. Where an action is based on a misrepresentation any chip or chink of evidence we can show to link the fraud with the truth we are entitled to show. We have already shown a misstatement, a deliberate misstatement in writing, of a letter in writing and a [159] subsequent letter in writing. And we have already shown he knew that the man had no authority. When you have shown that you have opened the door to the fact, did he have the authority, was it a directive, did he have anything to do with civilian production. I believe the testimony is very admissible and I believe the reason it is

fought for, contended so hard against it is they know what this sworn testimony is, that he didn't have the authority, that he had nothing to do with civilians, it was at the request of Grand Central, and I don't know why the jury shouldn't hear that if it be the fact.

The Court: The ruling sustaining the objection will stand.

Now on the motion to amend the answer.

Mr. Cutler: Can I make an offer of proof before I leave that and finish it right now?

The Court: Very well.

Mr. Cutler: Outside the province of the jury. I offer to prove through Colonel Pattillo the following items which have already been sworn to by Colonel Pattillo in another case in the Superior Court by which testimony was taken under oath.

One, that the Grand Central Airport had requested the space, not the Government, and that Pattillo merely complied with the request of the Grand Central in asking for this space involved in this suit. [160]

Two, that Pattillo, Colonel Pattillo, had no authority whatsoever to ask for the space, that that was a matter only outside of his authority, and indeed he didn't know who had the authority to do so anywhere in the Army. It might have been CAA, CAB or something else.

Three, that there was no intention on his part at the time he sent the letter of September 26, 1951, now in evidence that this would be an authority or a directive or a mandate or any instruction that

anyone had to comply with, that it was merely an answer to the request of Grand Central that they wanted the space. And that he had no power to issue a directive, that he did not consider this to be a directive and that he could in any way bind the Army to the extent it was any directive.

Four, he did not receive any instructions or authority—and I am using the exact words of his sworn testimony—other than a consultation with the Grand Central regarding the obtaining of the space at the Air Base.

Five, that Pattillo did not know whether it “is considered Government property or the kind that the courts could have, I don’t know.”

No. 6, that he had no authority to exercise the Government recapture clause, that he did not intend this letter to be in any way so considered, that he knows nothing about arrangements between the Government and the Tucson Airport [161] Authority, and that he sent this letter at the request of Grand Central.

I make that offer to prove it and I am willing to submit the sworn testimony for Colonel Pattillo, who is here, to prove those items. And your Honor has ruled, I believe has ruled you will not permit me to do so.

The Court: Very well. The offer of proof is rejected.

Mr. Cutler: Thank you.

The Court: Now on the motion to amend the answer. Counsel has moved to amend his answer and I believe furnished a copy to plaintiff’s counsel.

Mr. Cutler: We object to the amendment of the answer. We object on the following grounds:

First, until it was first sprung on us yesterday we had no knowledge whatever of any such defense.

Second, that we were not prepared and are not prepared to meet such a defense.

Third, that for some reason or other during pre-trial and all the time that this case took to go to trial there has been no divulging by the defendant of this defense, and,

Fourth, on the ground that the plaintiff has gone to great expense to get appraisers and counsel and a great many other things in here from different places, including my humble self from New York, when perhaps if such a defense had been urged at the proper time and if such a defense were [162] impregnable all that expense might have been saved. I believe to bring it up now at the last moment, during the course of a trial, is improper and not fair.

The Court: The motion will be granted. The answer may be amended in conformity with the portion of the motion which is set out in quotations.

Mr. Cutler: Does that mean you have granted it with no terms?

The Court: That is right.

Mr. Cutler: And you say I don't have to except to that?

The Court: That is true. Every action of the Court is excepted to automatically.

Mr. Cutler: All right.

The Court: Stand at recess until 11:20.

(Recess.)

JAMES L. PATTILLO

recalled as a witness herein, having been previously sworn, testified as follows:

Direct Examination

By Mr. Cutler:

Colonel, you were in daily contact with Grand Central Aircraft, weren't you?

A. Yes, sir. [163]

Q. Did you have an office with Grand Central Aircraft?

Mr. Evans: We object to this line of questioning on the ground it is completely immaterial and irrelevant.

The Court: Objection sustained.

Q. I am speaking of the time now in September, especially September 26, 1951, October and November of the same year, did you have an office with—don't answer it, they want to object—with Grand Central Aircraft?

Mr. Evans: We made the same objection on the ground it is immaterial and irrelevant to any issue in this case.

Mr. Cutler: Would your Honor hear me a moment on that?

The Court: The letter that is in evidence was addressed from Grand Central.

Mr. Cutler: Is that the reason, then? All right.

(Testimony of James L. Pattillo.)

We know that. Why may I not show he had an office there?

The Court: Go ahead, it will probably save time.

Mr. Cutler: Did you rule the second time on this question?

The Court: I am going to permit him to answer it.

Mr. Cutler: Do you know the question?

(The last question was read as follows: "Question: I am speaking of the time now in September, especially September 26, 1951, October and November of the same year, did you have an office with—don't answer it, they want to object—with Grand Central Aircraft?")

A. Yes, I had an office there in the building of the Grand Central Plant.

Q. And you were also in fairly continuous contact with Mr. Schmidt, the manager of the defendant, weren't you?

A. Yes, sir, I met Bob some time soon after I came to Tucson in August, 1951. I don't know how continuous continuous is.

Q. I don't either. But you would meet him from time to time almost every day or so, wouldn't you?

A. No, I might see Bob or might have seen him twice in one day; I might not have seen him again for several weeks or a month.

Q. But you saw him from time to time before you wrote the letter of September 26, 1951?

A. Yes, sir, I think I did.

(Testimony of James L. Pattillo.)

Mr. Cutler: That is all.

Mr. Evans: No questions.

Mr. Cutler: Mr. Alpert for one question and then the plaintiff will rest.

ROBERT J. ALPERT

recalled as a witness, having been previously sworn, testified as follows: [165]

Direct Examination

Q. (By Mr. Cutler): Mr. Alpert, in cross examination you were asked something about whether you came here in March and were on the payroll of the plaintiff in March. When in March did you come here?

A. It was in the latter part of the month.

Q. And that was when you were on the payroll?

A. Yes, at the earliest.

Q. In other words, it might have been later?

A. Yes.

Mr. Cutler: That is all.

Mr. Evans: No questions.

Mr. Cutler: Plaintiff rests.

Mr. Evans: The defendant has a motion to present to the Court at this time.

The Court: Very well. Counsel have indicated the plaintiff has now rested and have indicated they have a law matter to take up with the Court. Due to the hour we will recess until 1:30. I will ask you to be back at 1:30, and during the recess bear in mind the admonition.

(Jury retires from the courtroom.)

Mr. Evans: If it may please the Court, the defendant Tucson Airport Authority at this time moves the Court to instruct the jury to return a verdict in favor of the defendant [166] Tucson Airport Authority upon the grounds and for the reasons that the plaintiff has failed to prove by any competent evidence the material allegations contained in its complaint upon which their claim for relief is predicated. Specifically, that they have failed to prove the material allegations of an actionable case of fraud, and upon the further and specific ground that they have failed to prove the essential elements of a wrongful eviction or wrongful termination of the lease that is involved in this action. The formal part of the motion, and with the Court's permission, I would like to go a little further just in argument on that proposition.

(Argument by counsel.)

The Court: I will reserve ruling on the motion until the conclusion of all the evidence.

(Whereupon a recess was taken at 11:50 o'clock a.m. until 1:30 o'clock p.m. on the same day.)

The Court: You may proceed.

Mr. Evans: At this time, may it please the Court, the defendant offers in evidence a certification of the Secretary of the Arizona Corporation Commission.

The Court: Would you show it to counsel.

Mr. Evans: Yes.

(Defendant's Exhibit D marked for identification.)

Mr. Cutler: If the Court please, would you indulge me [167] for a moment. My associate counsel is getting me the statute on authentication. I don't know what it is here. He said I could have it; I have been waiting for it for the last few minutes. I want to look at it.

The Court: Well, of course, the authentication would be governed by the Federal practice in this court.

Mr. Cutler: Yes, of course. This is a certificate that we, of course, have never seen. It is not part of pre-trial. I pleaded against that before and I am not really pleading that, but I don't understand the certificate, that is all, and I know your Honor has read it. I will object to it on the ground it doesn't seem to me to be a properly authenticated certificate entitling it to admission. In the first place, the man who signs it calls himself Secretary in one place, Acting Secretary in another. I don't know whether the Arizona Corporation Commission has the right to issue such a certificate or if such a certificate is admissible here merely on its face. The language does not seem to me to be very clear. I think the way to prove it is to have the person in charge of these records here to say this, if that be the fact. At any rate, I object to it on the ground it is not a document that is properly authenticated and entitled to admission in this court and does not speak for itself: upon the ground it is not a public record, no authentication of the right of the Commission to so certify, and perhaps the proper proof is somebody [168] in that

office who searched for it and said he couldn't find it.

Mr. Evans: I believe Rule 44-B provides for that statement.

Mr. Cutler: May I look at Rule 44-B, please. Is there some act here that includes Rule 44-B?

The Court: The objection will be overruled. It may be admitted.

DEFENDANT'S EXHIBIT D

State of Arizona—Arizona—Corporation
[Seal] Commission

To all to Whom these Presents shall Come, Greeting:

I, Paul P. Tahy, Acting Secretary of the Arizona Corporation Commission, Do Hereby Certify That I have caused to be searched the records of the said Corporation commission concerning Worcester Felt Pad Corporation, a Massachusetts corporation: I further certify that filings in the incorporating division are filed under the true corporate name, and nothing is found for the name Worcester Felt Pad Corporation, a Massachusetts corporation, having qualified as a foreign corporation, or having been issued a License to do business in this State as a foreign corporation.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the Arizona Cor-

poration Commission, at the Capitol, in the City of Phoenix, this 8th day of December, 1953, A.D.

[Seal] /s/ PAUL P. TAHY,
 Secretary

Mr. Thompson: If it please the Court, we would like to call Mr. Alpert on cross examination under the statute as managing agent at the time this transaction occurred.

ROBERT J. ALPERT

recalled as a witness, having been previously sworn, testified as follows:

Cross Examination

Q. (By Mr. Thompson): You have been sworn, Mr. Alpert? A. Yes.

Mr. Thompson: It is all right to proceed, your Honor?

The Court: Yes.

Q. (By Mr. Thompson): You have been sworn in this case, Mr. Alpert?

A. I believe so. [169]

Q. I believe you testified this morning on direct examination you were an employee of the Worcester Felt Pad Corporation beginning some time in March, 1949, is that correct?

A. That is correct.

Q. Where did you live previous to coming to Tucson? A. Chicago, Illinois.

(Testimony of Robert J. Alpert.)

Q. And what had been your business and experience?

Mr. Cutler: I don't know what this is all about, but I don't know how that becomes material. I don't think I asked my client or any other witness about his business or experience except on expert. I don't know how this becomes material, where he lived or what he did.

The Court: I don't see the materiality of it at present. Is this preliminary?

Mr. Thompson: Yes, just preliminary to finding out what his purpose was in coming to Tucson.

Mr. Cutler: I am not interested—I beg your pardon. I don't think his purpose in coming to Tucson is material to this case. He is not an officer. They have already had some objections sustained on the ground that he is not an officer.

Mr. Thompson: I will withdraw that question to save time.

Q. By Mr. Thompson): Where were you when you were employed by Worcester Felt Pad Corporation? A. I was in Arizona. [170]

Q. Didn't the company pay your way out here?

A. No, they did not.

Q. The Worcester Felt Pad Corporation pay your expenses out here, did they not, Mr. Alpert?

A. No, they did not pay my expenses out here.

Q. No part of them?

A. No part of them.

Q. You had not been employed when you arrived in Arizona? A. No.

(Testimony of Robert J. Alpert.)

Q. You came to Arizona when?

A. Some time in the latter part of March.

Q. And immediately started to work for them, for the Worcester Felt Pad Corporation?

A. Well, it depends upon your definition of work. I was here but there wasn't anything really to work on.

Q. But you were drawing pay, you were in their employ drawing pay?

A. I am not sure if I was drawing pay immediately.

Q. When did you start to draw pay?

A. Frankly, I don't know, sir. I don't recall the exact date.

Q. But some time shortly after your arrival in Arizona you did come to work for the Worcester Felt Pad Corporation, that is correct, is it not?

A. That is correct. [171]

Q. When was the first time you ever went to the Tucson Airport to the leased premises?

A. Oh, I imagine it was after I arrived here, shortly after I arrived here, but I wouldn't know when.

Q. What were your duties, Mr. Alpert, with the Worcester Felt Pad Corporation?

Mr. Cutler: When?

Q. From the time he was employed. Any time, I don't care. Pick a time.

Mr. Cutler: All right, I beg your pardon. Start at the beginning.

(Testimony of Robert J. Alpert.)

A. Well, I think I had no specific duties when I came down here.

Q. But the duties had been discussed before you got here, weren't they?

A. Not in detail, no.

Q. But in general they had?

A. Not very much in general. I had really very little idea——

Q. Mr. Alpert, you knew when you left Chicago that you were going to work for Worcester Felt Pad Corporation?

A. That is correct, as far as going to work for Worcester Felt Pad Corporation, yes.

Q. That is right. And in Arizona?

A. Well, I wouldn't be prepared to go along with that all the way, because there was a possibility I could be working [172] elsewhere.

Q. But you came to Arizona primarily to go to work for Worcester Felt Pad Corporation?

A. That is correct.

Q. And you did go to work for them?

A. That is correct.

Q. And what were your duties when you went to work for them, that is what I want to know.

A. Actually Mr. Brauer was here and I assisted Mr. Brauer in his activities at the time.

Q. Mr. Brauer was here during all of that time, was he? A. During all of what time?

Q. During all the time when you came here until you started out manufacturing? A. Yes.

Q. He was here? A. Well—yes.

(Testimony of Robert J. Alpert.)

Q. He was in Tucson?

A. I am not sure if he was here actually at the time we started manufacturing, but he was here some time after the day I was here. I am a little hazy on the dates.

Q. What were your duties now, tell the jury, what were your duties?

Mr. Cutler: When?

Q. As manager? [173]

Mr. Cutler: When?

Q. At any time when he was here working for them. What were your duties?

A. I was in charge of the local operation of the Worcester Felt Pad Corporation.

Q. Were other people employed by Worcester Felt Pad Corporation than yourself in Arizona in April of 1949?

A. I don't know if they were in April. I don't think so.

Q. When did you begin employing other persons other than yourself and Mr. Brauer for the benefit of Worcester Felt Pad Corporation?

Mr. Cutler: Well, of course, technically he didn't employ Mr. Brauer.

Mr. Thompson: Well, he was employed by the plaintiff here.

Mr. Cutler: That is different.

A. Oh, I don't know, I suppose it was around, oh, possibly June or July, somewhere in there.

Q. You think that was the first people hired was in June or July?

(Testimony of Robert J. Alpert.)

A. To the best of my recollection.

Q. Did you maintain a bank account in Tucson for Worcester Felt Pad, Mr. Alpert?

A. Did I maintain?

Q. Did the company maintain a bank account here in Tucson, [174] Arizona?

A. Yes, the company maintained a bank account.

Q. With what bank?

A. Valley National Bank.

Q. And employees were paid through that account, were they not? A. Yes.

Q. Now, attempt to refresh your recollection and tell me when you first hired anyone to work for Worcester Felt Pad after March, 1949, in Arizona?

A. I have already answered that to the best of my recollection, sir.

Q. And that is your recollection. Now, was machinery ordered installed, to be installed in the plant, was purchased for that purpose?

A. There again I don't know. I came out here cold and I was under the impression the machinery had come from back East.

Q. When did the machinery arrive? When did the first shipment of machinery arrive?

A. I couldn't give you an exact date on that.

Q. To the best of your recollection?

A. To the best of my recollection, it was some time after I got out here.

Q. Well, sometime, that covers a wide field. Was it in the month of April? [175]

(Testimony of Robert J. Alpert.)

A. It could have been. It could have been May. Truthfully I don't remember. It could have been June.

Q. The first work done by Worcester Felt Pad under your supervision as manager was installation of machinery and readying of the plant for production, isn't that correct?

A. Well, yes, they had to set the plant up, that is correct.

Q. And when was it set up and the operations start?

A. Again I think it was probably some time in the period June or July, as I said.

Q. That was when manufacturing started, you think? A. Yes.

Q. How long a time did it take to get the machinery set up and get set for operations?

A. I don't know. It probably took possibly a month. I don't remember offhand. That applies back to the previous question, when the machinery got out here.

Q. I missed the answer. Will you tell me again how long you think it took for you to set up the machinery?

Mr. Cutler: He said about a month he thinks. He doesn't know.

Q. Before I proceed further I am calling your attention—I won't ask you any question about it except to ask you if this refreshes your recollection—Plaintiff's Exhibit 10 for identification, it is

(Testimony of Robert J. Alpert.)

not in evidence, but I want you to examine this document——

Mr. Cutler: I object. Excuse me—— [176]

Mr. Thompson: I am not asking about anything——

Mr. Cutler: I understand what you are doing, before you do it may I make an objection?

Mr. Thompson: All right, object.

Mr. Cutler: I object to showing the witness a paper not in evidence which was kept out of evidence through the strenuous efforts of my friend who is now handing it to the witness. That is improper examination. It hasn't been shown yet he needs to look at the paper. A foundation has not been laid for showing him a paper, and certainly not one not in evidence.

The Court: The objection will be overruled.

Mr. Cutler: All right.

Q. (By Mr. Thompson): Does that refresh your recollection on whether or not your expenses were paid to Tucson by the Worcester Felt Pad Corporation?

A. Well, yes, it throws some more light on it.

Q. Were your expenses paid to Tucson by Worcester Felt Pad?

A. Well, on sort of a contingency basis. I paid them myself coming out here.

Q. But they were repaid to you by Worcester Felt Pad, is that correct?

A. Well, yes, they were.

Q. Now, during the time you were here what

(Testimony of Robert J. Alpert.)

was the business of Worcester Felt Pad in Arizona? I think I am clear on it but I would like to have you tell me. What did you manufacture [177] and sell in that area?

A. Ironing pads and covers, various textile products used in kitchens.

Q. You bought raw material, did you, then manufactured it into that, I presume?

A. That is correct.

Q. You bought any material that went into the final fabrication of this article, the raw materials were purchased by the company and then the employees cut them up, sewed them, did whatever was necessary to make ironing pads and so forth out of them?

A. That is right.

Q. You had how many employees working in this area during this time, what was the maximum that you had?

A. Possibly ten or twelve.

Q. And what hours did they work during the week, your employees?

A. They put in an eight hour day.

Q. You only worked one shift, I presume?

A. That is correct.

Q. In the daytime. What was done with these articles of manufacture when they were produced?

A. They were sold.

Q. Sold. Sold here locally and in the western states, is that right? [178]

A. That is correct.

Q. But you did sell many of them right in and

(Testimony of Robert J. Alpert.)

around Tucson, that is correct, is it not, and Phoenix?

A. Well, what do you mean by "many?"

Q. A substantial part of your business was in Arizona, of the Tucson business was in Arizona?

A. No, I wouldn't say that.

Q. Well, a part of it was here?

A. A part of it was here, not a substantial part.

Q. Now, as I understand it, your work continued from the time or about the time you first came here until some time, was that in January of '51, am I correct in that, when you finally left Tucson, Mr. Alpert?

Mr. Cutter: '52 it is.

A. 1952, that is correct.

Q. December of '52, that is correct?

Mr. Cutler: December of '51.

Q. You were here in this town from March '49 to December '51?

A. No, that is not quite correct. I was here actually until January, I think February of '52.

Q. That was during the time you were packing up and moving? A. That is right.

Q. And you packed up and moved a part of your machinery to other places, is that correct?

A. Yes, that is right. [179]

Q. For the purpose of setting up another branch in California, is that right?

A. No, that is not correct.

Q. Or did you ship it back to Massachusetts?

A. That is right.

(Testimony of Robert J. Alpert.)

Q. Do you know whether or not the company still has any property stored here at Ryan Field?

Mr. Cutler: Objected to as immaterial.

The Court: He may answer.

A. I don't know, sir.

Mr. Thompson: No further questions.

Examination by Mr. Cutler:

Q. You were a Naval Officer for the United States Government? A. Am I now?

Q. You were? A. I was, yes.

Q. What was your office?

A. I was a lieutenant junior grade.

Q. And when you came out here you paid your own expenses, didn't you?

A. When I came out here, that is correct.

Q. How much later did you get your expenses, you said were on a contingent basis, when did you get them back? [180]

A. I wouldn't recall.

Q. Was it some time after you got here?

Mr. Thompson: I object to that as leading and suggestive.

Mr. Cutler: You brought it up.

Mr. Thompson: He said he doesn't know. This is cross examination.

Mr. Cutler: Wait a minute——

Mr. Thompson: I am objecting because it is leading and suggestive and not cross examination.

Mr. Cutler: This is cross examination of what

(Testimony of Robert J. Alpert.)

you brought out, and I believe the rule is I am allowed to lead on cross examination.

The Court: I am going to let him answer. The question was, was it some time after you got here.

A. Yes.

Q. (By Mr. Cutler): And you didn't get here until the last week of March, 1949? A. Yes.

Mr. Cutler: That is all.

JULIUS BRAUER

recalled as a witness, having been previously sworn, testified as follows: [181]

Cross Examination

Q. (By Mr. Thompson): Mr. Brauer, you have been sworn previously and testified in this case?

A. Yes, sir.

Q. And you are and were during all the times mentioned in the plaintiff's complaint president of Worcester Felt Pad Corporation? A. Yes.

Q. And as such you were its chief executive officer? A. Yes, sir.

Q. And it operated originally in Massachusetts?

A. We still do operate there.

Q. And prior to it ever coming to Arizona it operated in Massachusetts? A. Yes, sir.

Q. About some time prior to 1949 or at least prior to March, 1949, the company decided to open a plant in Tucson, didn't it? A. No.

Q. You would say there wasn't any such inten-

(Testimony of Julius Brauer.)

tion on the part of the company prior to March, 1949? A. That is right.

Q. And you did come to Tucson, the company did, in March, 1949, did it not?

A. That was when I signed my lease, wasn't it?

Q. That was when you signed the lease.

Mr. Cutler: I object to the conclusion. The company did come to Tucson. I have no objection to the statement that the company signed a lease on March 1, 1949.

The Court: That was the witness' answer.

Q. At the same time or thereabouts you sent your son-in-law here for the purpose of managing the company's affairs in Tucson, isn't that correct?

A. No.

Q. You say you didn't send him here?

A. No, sir.

Q. He came here at your request, did he not?

A. Yes.

Q. And you paid, the company paid his expenses for coming here, did it not?

A. They did, yes.

Q. And he did immediately become the manager of the Worcester Felt Pad in Arizona, did he not?

Mr. Cutler: I object to the use of the word "immediately." I have no objection to the time being stated when he entered into the employment in Tucson.

The Court: He may answer.

Q. He immediately became manager of the Tucson plant, did he not?

(Testimony of Julius Brauer.)

A. We didn't have a plant until I set up my machinery, but [183] I would say when I got started he was the manager.

Q. And he was representing you and being paid a salary for the actual manufacturing started, was he not, Mr. Brauer?

A. Might be possible.

Q. What?

A. Might be so because he is my son-in-law, you know.

Q. You were at that time and prior to the manufacturing of any material, you were installing machinery there and arranging for help, were you not?

A. We were, I would say, sometime in April or March perhaps, I would say we were. I couldn't say exactly, but around that time.

Q. Do you recall when the first machinery was brought into Tucson by your company?

A. Not the exact date.

Q. Well, within—approximately when was it?

A. I surmise, I say the end of March or early April, and so on. I surmise it was about then.

Q. When were the first employees other than your son-in-law hired by Worcester Felt Pad?

A. At the time when we started to get materials in.

Q. Some time late in March, 1949, is that correct?

A. You are speaking of actual employees doing work?

(Testimony of Julius Brauer.)

Q. Putting in the machinery and so forth, yes.

A. I would think so. [184]

Q. And prior to that time you had been making some investigation about the employment situation for the purpose of hiring employees, did you not?

A. Let's put it I was investigating to see the feasibility of hiring employees for whatever purposes I wanted to use them for.

Q. I call your attention to Defendant's Exhibit 10 for identification, merely ask you is that your signature? A. Yes, sir.

Mr. Cutler: Is this the letter I offered in evidence?

Mr. Thompson: This was the letter that was objected to a few minutes ago.

Mr. Cutler: Is this the letter I offered in evidence, whether it was his signature?

Mr. Thompson: Yes.

Mr. Cutler: I just wanted to know.

Q. (By Mr. Thompson): Does that refresh your recollection?

Mr. Cutler: I object to this course of examination. I understand the rule to be that you must lay a proper foundation. The proper foundation is, if you can't answer the question and you need recollection you may show a witness something to cause him to recollect, but you must first exhaust the witness and see if he can answer your question without refreshing his recollection.

The Court: I will agree with you one hundred

(Testimony of Julius Brauer.)

per cent [185] on direct examination, but this is cross examination.

Mr. Cutler: Then will you let me finish my sentence. Even in cross examination I believe that the procedure is to first find out if the witness can answer without the paper, not given the paper first. However, that is my objection.

The Court: The objection will be overruled.

Mr. Cutler: Especially where the paper is not in evidence and has been objected to by the man offering it now to the witness to refresh his recollection.

Mr. Thompson: I will withdraw the question, then reframe it in another way.

Q. Did you state to the Tucson Airport Authority, rather did your company state under your signature that it made up its mind to come into Tucson more than three years before January 15, 1952. Did you make that statement?

A. There was a reason for my making the statement.

Q. Did you make the statement?

A. Yes, I did.

Q. You said that your company had determined to come into Arizona three years before 1952?

Mr. Cutler: Is this using the contents of a letter not in evidence to which you objected to the admission of? That isn't proper because if it is, that letter then becomes admissible.

The Court: The question has been asked and answered. [186]

(Testimony of Julius Brauer.)

Q. (By Mr. Thompson): I believe, Mr. Brauer, you testified that part of the operation was you manufactured into ironing pads and the like and sold them in this western country, is that right?

A. Yes, sir.

Q. You kept books here in Tucson?

A. Yes.

Q. You had a bank account here in Tucson?

A. Yes.

Q. Your employees were paid out of that bank account?

A. Yes, sir.

Q. And your bills were mailed from Tucson for supplies?

A. That is right.

Q. You billed stuff from the wholesalers or whoever supplied you with raw materials, they sent them to you here in Tucson for fabrication?

A. Yes. They were not paid, those bills, the bills were not paid out of Tucson.

Q. But they were sent here to Tucson.

A. Yes.

Q. And the materials were manufactured in Tucson?

A. Yes.

Q. And they were billed to the customers in Tucson?

A. Yes, sir.

Q. And payments made by the customers to your place in Tucson? [187]

A. No, sir.

Q. No payments ever made?

A. In very rare instances. Payments were to be made to our home plant.

Q. But there were payments made to you here, were there not?

(Testimony of Julius Brauer.)

A. It is possible perhaps local payments were.

Q. That is what I am asking about, local payments? A. It is possible.

Mr. Thompson: That is all.

Mr. Cutler: May I have that exhibit, please?

Examination by Mr. Cutler:

Mr. Cutler: I now offer in evidence Exhibit 10 upon the ground by reading a paragraph or a sentence from it to the witness he made the whole exhibit admissible.

Mr. Thompson: I certainly object to that, your Honor. First off I merely showed it to the witness to refresh his recollection and he answered the question "Yes" and that is the end of it.

The Court: I don't recall his reading anything out of it. The objection will be sustained.

May I ask counsel when you are through with the exhibits if you will please give them back to the clerk.

Q. (By Mr. Cutler): Something was said to you about a statement that for three years you had been intending to get [188] in here, and you said you made such a statement for reasons, but nobody asked you what the reasons were. Explain that, please.

Mr. Thompson: I object to that on the ground——

The Court: I will let him answer.

A. When I wrote that letter I was in hopes by presenting a good case to the Tucson Airport Authority that they would consider my plea for them

(Testimony of Julius Brauer.)

to pay me the monies I expended in coming into the city and going out of the city. Naturally, under those conditions I put as nice a picture as I could with that expectation. That is the answer. I am not an attorney. I wrote a letter I thought was a nice way of trying to get them to do so.

Q. On March 1, 1949, when you made this lease did you intend then to operate—tell us how you signed the lease?

Mr. Thompson: I object to that on the ground the lease speaks for itself. It was made by a corporation.

Mr. Cutler: This is slightly different from what you were trying to bring out when you brought out the statement from this witness about the three years. He is entitled to explain it.

The Court: You have a double question there.

Mr. Cutler: I will try to cut them down into separate questions.

The Court: Reframe it, please. [189]

Q. Withdraw the question. When you came here on March 1 and signed the lease in evidence did you intend then to operate here?

Mr. Thompson: Just a moment. I object to that question. It seems to me that is highly immaterial. First off it is leading, suggestive and it is absolutely improper because the lease shows who signed it and it wasn't signed by this witness personally, signed by a corporation. It is self-serving.

(Testimony of Julius Brauer.)

Mr. Cutler: What has that to do with the question you are trying to put to the Court?

The Court: When you say "you" you mean the Worcester Felt Pad Corporation?

Mr. Cutler: Yes, sir.

The Court: He may answer.

(The last question was read as follows:

"Question: When you came here on March 1 and signed the lease in evidence did you intend then to operate here?")

A. When you asked me if I came here March 1, I was here prior to March 1.

Q. I am talking about March 1. Did you know then you were going to operate a factory here or not? A. Not one hundred per cent, no.

Mr. Cutler: You may examine. [190]

Recross Examination

Q. (By Mr. Thompson): You were here prior to March 1, you say?

A. I was here, I think either November or December. I have been coming here to Tucson for the past eight years about the same time for the winter months.

Q. Who did you first say you contacted about coming here for property for your factory?

A. I think the first one I saw was Dick Drachman.

Q. And you told him you wanted a location for your corporation's factory, did you not?

A. No. I told him the stories around town that

(Testimony of Julius Brauer.)

the Tucson Airport Authority has some space to rent at a very low figure and I would be interested in looking at it.

Q. Didn't you tell the people in the Tucson Airport Authority that that's what you intended to do with that property?

A. Before they would consider at that time renting space to anyone else or anyone, let's say, a manufacturing concern, they wanted to know what you had in mind to do with it. And I was told the City didn't have sufficient power to handle big concerns, therefore I told them what I had in mind was something with light manufacturing equipment.

Q. Didn't you tell your counsel in this case that the reason you got such a low rent was because you represented to the Tucson Airport Authority you were going to run a factory here [191] and employ people? Didn't you tell your own counsel that, Mr. Brauer?

A. I don't gather that——

Q. Didn't you tell him that in substance? You heard his opening statement to the jury yesterday, didn't you?

A. Yes. If you asked me to repeat it I wouldn't know.

Q. Didn't you tell him that? Wasn't that made with your authority, didn't he get that information from you?

Mr. Cutler: I thought we understood lawyers' openings and lawyers' closing, both of us agreed,

(Testimony of Julius Brauer.)

didn't amount to anything, it was the evidence that counted.

Mr. Thompson: It is cross examination. I am merely asking him if he told his counsel that.

Mr. Cutler: He says he didn't. He says he didn't know what I said.

Q. (By Mr. Thompson): You never told your counsel that when you came here you represented to the Tucson Airport Authority that you were going to operate the Worcester Felt Pad Corporation manufacturing plant or branch of it in Tucson?

A. Let's say this way. I had in mind at the time that this was a terrific deal for me to take over in that I had a business, Tech Toys——

Q. Now, Mr. Brauer,——

Mr. Cutler: May he answer?

The Court: He asked you if you told him thus and so. [192]

Q. (By Mr. Thompson): You can say "Yes" or "No." Did you tell them that, that you were going to open a factory for Worcester Felt Pad at that plant?

A. I would say no, not from the start.

Q. Isn't that the reason you say they gave you the low rental because you made that representation to them?

A. That I was going to do what?

Q. You got the low rental because you were going to operate a factory there, employing people?

A. That may be so.

Mr. Thompson: That is all.

(Testimony of Julius Brauer.)

Re-Examination by Mr. Cutler:

Q. At the time you had got the lease, you were starting to say you had got a good deal, is that what you were going to say? A. Yes.

Q. You then didn't know whether you were going to use it for Tech Toys——

Mr. Thompson: Oh, I object to this leading and suggesting.

Mr. Cutler: Withdrawn.

Q. Did you have another corporation called Tech Toys?

A. It was in the process of being formed.

Q. Where was that at the time, where was the operation? [193] It wasn't operating, was it?

A. No.

Q. You had in mind you would be using——

Mr. Thompson: I object——

Q. Did you have anything in mind with reference to Tech Toys?

A. Yes, sir, I thought I could make an advantageous lease to Tech Toys for the space; that is why I insisted on the clause I had a privilege to sub-let my space to suitable tenants.

Q. You did insist upon the clause in the lease, that is paragraph—I will show it to you to refresh your recollection.

Mr. Thompson: If it please the Court, I don't think that is proper. It is part of the lease. It is there.

(Testimony of Julius Brauer.)

The Court: He may show it to him. The lease hasn't been put in evidence.

Mr. Cutler: I think it would be wiser if I put the lease in evidence. Then I offer in evidence the lease in this case dated March 1, 1949.

Mr. Evans: I am sure we have no objection.

The Court: It may be admitted.

(Plaintiff's Exhibit 1 in evidence.)

[Plaintiff's Exhibit 1, Lease, is set out at pages 13-18 of this printed record.]

Q. (By Mr. Cutler): Was it upon your insistence such a clause be put in the lease?

A. Yes, sir.

Q. Then you then had in mind you might sublease all the [194] premises——

Mr. Thompson: I object to that again. Counsel knows better, if it please the Court, than to continually lead the witness.

The Court: It is leading.

Mr. Thompson: And it is immaterial further.

Q. (By Mr. Cutler): What did you have in mind when you insisted upon the insertion of the clause that any part or all of the premises could be assigned and that the landlord would have to accept them, providing they were satisfactory?

Mr. Thompson: Just a moment, please. This is all improper, immaterial and certainly improper redirect examination, if it please the Court.

(Testimony of Julius Brauer.)

The Court: He may answer.

(The last question was read.)

A. It seems to me the basis of the rental I was getting——

Mr. Thompson: May I, for the record, make the further objection it is self-serving.

Mr. Cutler: Everything the witness says is self-serving to his side of the case. There wouldn't be any testimony otherwise if he is a party.

The Court: I will overrule the objection.

Mr. Cutler: Shall we read it again to you now?

(The last question was read as follows:

“Question: What did you have in mind when you insisted upon the insertion [195] of the clause that any part or all of the premises could be assigned and that the landlord would have to accept them, providing they were satisfactory?”)

A. My thought behind that was here was a lease I was getting at a very low price and it looked to me that there was a good opportunity to sub-let it at an advantageous rate to someone else. At first I had in mind Tech Toys. Then I also considered other factors, possibly people coming into town and wanting space.

Q. And you didn't make up your mind about actually going ahead with the manufacturing operation until much later, did you?

Mr. Evans: Again an extremely leading question.

The Court: It is leading. Don't lead the witness.

(Testimony of Julius Brauer.)

That is a statement, all he has to do is say "Yes" or "No."

Q. (By Mr. Cutler): When did you make up your mind to go ahead with the manufacturing operation yourself?

A. It would be about the end of March, and if I can go into an explanation——

Q. Nobody has stopped you yet. I am waiting but nobody has stopped you.

Mr. Thompson: Then I will stop him.

Mr. Cutler: You didn't disappoint me, Mr. Thompson. You are right on the ball.

Mr. Thompson: I object to this as not responsive to any [196] question.

The Court: Objection sustained.

Q. (By Mr. Cutler): So next time you don't ask.

Just one more question and I will be through, Mr. Brauer. The lease of course now in evidence provided you didn't have to pay rent until three months later, that is June 1, 1949, is that right?

A. Yes, sir.

Q. What did you have in mind when you insisted—withdrawn. Was it you that insisted upon not paying rent for three months later?

Mr. Thompson: Please. I can't protect myself——

The Court: Objection sustained.

Q. What did you have in mind with reference to this clause?

A. During the three month period——

(Testimony of Julius Brauer.)

Mr. Thompson: I object to it on the ground, I believe the first question was highly improper, it was leading, suggestive. Counsel must have done it with a purpose. I have repeatedly objected to it and I object to any answer based on that kind of procedure.

The Court: The objection will be sustained.

Mr. Cutler: You may examine. Talk about purposes, I think you have had some here too. [197]

Recross Examination

Q. (By Mr. Thompson): Mr. Brauer, after the lease of March, 1949, you said your company did go into operation, didn't you?

Mr. Cutler: If he said so it isn't deemed necessary to be repeated again.

Mr. Thompson: This is preliminary, if it please the Court.

The Court: He may answer.

A. Yes, sir.

Q. Some time after you began operation this lease was modified, was it not?

A. What do you mean?

Q. By changing the space that you were entitled to occupy under it?

A. I don't call that modifying it.

Q. You were moved to and occupied other space?

A. That was part of my lease.

Q. But you were moved and taken to other space which you accepted? A. Yes.

(Testimony of Julius Brauer.)

Q. At that time you were engaged in manufacturing? A. Yes, sir.

Q. Would it be correct that some time in March, 1949, Worcester Felt Pad opened a bank account here in the Valley [198] National Bank in Tucson?

A. I surmise so.

Mr. Thompson: That is all.

Mr. Cutler: That is all, Mr. Brauer.

ROBERT SCHMIDT

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Evans): You were previously sworn? A. Yes, sir.

Q. You identified yourself as manager of the Tucson Airport Authority? A. Yes, sir.

Q. Mr. Schmidt, when is the first occasion you recall meeting Mr. Julius Brauer, president of the Worcester Felt Pad Corporation?

A. It would have been some time in the fore part of 1949, January or February.

Q. And at the time you met Mr. Brauer did you have any discussion with him in connection with the entering into a lease between the Tucson Airport Authority and the Worcester Felt Pad Corporation? A. Yes.

Q. Do you recall where that conversation took place? [199] A. At the airport.

Q. Do you recall who was present besides Mr. Brauer and yourself?

(Testimony of Robert Schmidt.)

A. I do not recall that anyone else was present, no.

Q. Was there anything in that conversation, Mr. Schmidt, by Mr. Brauer concerning the purpose for which he desired to use the premises that might be leased by him?

Mr. Cutler: I object upon the ground that, first, the lease speaks for itself; second, your Honor has prevented us from giving any conversations prior to the lease on the ground that the lease incorporated and merged those conversations; third, that it is a leading question, asking him about one particular thing; fourth, it would contradict the lease because the purposes set forth are set forth in the lease and any conversation between them would not be binding; fifth, it is irrelevant, incompetent and immaterial.

The Court: The objection will be overruled. Answer that "Yes" or "No."

(The last question was read.)

A. Yes.

Q. What was that?

Mr. Cutler: I object upon the grounds stated, and upon the ground that a lease speaks for itself and states the purpose and anything other than that would be contradictory and if it were, would not be admissible, and it is irrelevant, [200] incompetent and immaterial, and that the lease speaks for itself, as my opponent has so ably urged when I tried the same thing.

(Testimony of Robert Schmidt.)

The Court: The objection will be overruled. Mr. Cutler, please limit yourself to making an objection in the regular way.

Mr. Cutler: All right. In other words, without argument.

The Court: Without any reference to objections made by the other counsel.

Mr. Cutler: All right, I shall try to follow your ruling.

(The last two questions were read as follows:

“Question: Was there anything in that conversation, Mr. Schmidt, by Mr. Brauer concerning the purpose for which he desired to use the premises that might be leased by him? Answer: Yes. Question: What was that?”)

A. Yes, there was a discussion of general type and kind of operation that might be conducted by the plaintiff.

Q. Did he say what type operation that was to be?

Mr. Cutler: Same objection.

The Court: Same ruling.

A. I discussed the parent organization at Worcester and some mention was made of the possibility of a like industry; I do not recall there was anything specific at that time as to whether it might or might not be the other corporation [201] which was mentioned momentarily, Tech Toy.

Q. Mr. Schmidt, after the Worcester Felt Pad Corporation actually took over the premises that was described in the original lease between the

(Testimony of Robert Schmidt.)

plaintiff and the Tucson Airport Authority, can you tell us what space was actually occupied by Worcester Felt Pad Corporation?

A. Yes. In the original occupancy of space they took second story, what we refer to as loft space, on the west side of hangar 2 at the north end thereof, if I recall correctly, between columns 1 and 20.

Q. Was that space that was originally occupied by the Worcester Felt Pad Corporation, what has been mentioned as covered space or uncovered space?

Mr. Cutler: I object on the ground it doesn't seem to me to make the slightest difference what was originally occupied. The question is what were we deprived of in November and December, 1951, if I understand the case. And what difference does it make what it originally was so long as by mutual consent the man was moved to the space he occupied.

The Court: What is the materiality of it, Mr. Evans?

Mr. Evans: To show the reason for the rental being as low as it was and the exception to the original lease, if it please the Court.

Mr. Cutler: If your Honor please, I don't think——

The Court: I don't think that is material. [202]

Mr. Cutler: Thank you.

Q. (By Mr. Evans): Mr. Schmidt, approximately how long did the Worcester Felt Pad Cor-

(Testimony of Robert Schmidt.)

poration remain in the space that was originally assigned to it?

Mr. Cutler: Same objection.

The Court: He may answer that.

A. I would say until about June of 1950, about some place between twelve and fifteen months.

Q. And they were moved at that time to another location at the airport? A. Yes, sir.

Q. And did they remain at this new location then until they finally moved from the airport completely or was there again another move upon the airport itself?

A. There was another move, yes, sir.

Q. And when was that last move made?

A. That move was made in, I would say, March or April of 1951.

Q. And where was the space that was last occupied by Worcester Felt Pad Corporation?

A. Well, the last space was in the south end of the east lean-to of hangar 1, south of what is properly or commonly known as the Airline Terminal area.

Q. How much area was there in the space that was occupied by Worcester Felt Pad Corporation at the termination of its [203] lease?

Mr. Cutler: I object to the word "termination of its lease." I don't know what that means. The lease didn't terminate for nine years and seven months thereafter. If he means at the time we went out, I have no objection.

Q. (By Mr. Evans): I will withdraw the ques-

(Testimony of Robert Schmidt.)

tion and ask it again. In November, 1951, how much space at the airport was Worcester Felt Pad Corporation occupying?

A. I will have to qualify that slightly for this reason——

Mr. Cutler: Wait a minute. Will you please answer the question and then qualify it afterwards? I believe if you can you should answer the question, I submit to the Court.

The Court: Can you answer how much space they were occupying in November?

A. The Felt Pad Corporation proper was occupying about 7500 or 8000 square feet, approximately.

Mr. Cutler: What does the word "proper" mean?

Mr. Evans: Approximately.

Mr. Cutler: No, I thought he said "proper."

The Witness: No, approximately.

The Court: Didn't you say the Felt Pad Corporation proper?

The Witness: That is right. You are correct.

Mr. Cutler: What did you mean——

Mr. Evans: Let me finish then you will have a chance to [204] cross examine.

Mr. Cutler: No, not you finish. Wait a minute. He is asked to state how much space, not proper or improper or main or subsidiary. He is asked to state how much space. That is the answer to the question. He can't divide it up by saying part of

(Testimony of Robert Schmidt.)

it was proper and leaving out another part, if there were another part, I don't know.

The Court: If counsel doesn't clear it up I will permit you to do so.

Mr. Cutler: All right, that is good enough for me.

Q. (By Mr. Evans): What do you mean by 7500 or 8000 feet property?

Mr. Cutler: Proper.

Q. Proper?

A. Because on the first floor of the east lean-to of hangar 1, temporarily, by mutual agreement, some space was occupied with the Tech Toy line stock which was being closed out. Those stocks, the plastic pieces for the toys were stored in large barrels and were kept on the first floor. Now so that there is no misunderstanding, there never was any formal segregation or assignment or subleasing, whatever you might call it, to Tech Toy Corporation proper. But part of the plaintiff's space was, during the major portion of its tenancy with us, occupied by stocks of the Tech Toy Corporation, which was of course common knowledge to us, we knew that. [205]

Q. In other words, they had 7500 or 8000 feet of loft space?

A. That was actually being used for the operation of the Worcester Felt Pad operation itself, yes.

Q. Then there was other space on the first floor which was occupied by——

A. Temporarily, yes.

(Testimony of Robert Schmidt.)

Q. —Tech Toy stock. What do you mean by “temporarily,” what was the understanding or agreement between the Airport Authority and Worcester Felt Pad Company with respect to the occupancy of that first floor space by Tech Toy?

A. It added up to this: They had made a determination of their own, as I understand it, to close out the Tech Toy line and dispose of the surplus sets and parts for sets, and in so doing—I must explain this way, we were in transition, everything was being moved on the airport and there wasn’t on the second floor sufficient space for them to put everything. So some of that went on the first floor until it was closed up.

Q. What was the understanding or agreement between Tucson Airport Authority and Worcester Felt Pad Corporation, if there was any agreement, as to what would happen to the first floor space after Tech Toys had removed all its stock?

A. Well, to the best of my recollection the actual and final allocation of space as a result of the second move was never completely adjudicated. I would put it this way, there [206] was no disagreement amongst us, it was simply a question they had to have so much space to take care of so much material and operation, and at that particular time their actual space requirements after the Tech Toy line had been removed from the premises was less than it would have been had they kept it; and by no means do I wish to imply they were not entitled to the full amount we originally discussed.

(Testimony of Robert Schmidt.)

It was simply a question, let us say, of amicable relationship during the second move. That was a problem for both of us.

Q. During the time you have been manager of the Tucson Airport Authority has there been established rental basis for the occupancy or renting of space at the Tucson Airport Authority property?

A. Yes.

Q. And in November, 1951, say the 1st of December, 1951, what was the established rental charged by the Tucson Airport Authority for the type of space occupied by Worcester Felt Pad Corporation on the second floor on the east side of the building commonly known as the Airlines Terminal?

Mr. Cutler: I object upon the ground, first, that the word "established rate" doesn't mean anything; second, that he is not qualified as an expert in the usual way; third, that if he means by "established rate" the rate that they charged, it would be inadmissible, and, fourth, on the ground it is irrelevant, immaterial and improper.

The Court: He may answer. [207]

A. The question was the established rate, second floor, east lean-to, south end?

Q. Of the space occupied by Worcester Felt Pad?

A. That was four cents a square foot.

Q. Did you have any space at the Tucson Municipal Airport in December of 1951 that was renting for ten cents a square foot?

(Testimony of Robert Schmidt.)

Mr. Cutler: I object on the ground it is immaterial, irrelevant and improper.

The Court: He may answer.

A. Yes, we had space at that time that rented up as high as \$1.50 a square foot.

Q. Where was that?

A. That is in the terminal area proper where the optimum in facilities is furnished, complete with janitor service, higher type of ventilating and heating.

Q. What was the highest rental that the Tucson Airport Authority was receiving in December, 1951, for space of the same type as that occupied by Worcester Felt Pad Corporation, on the 1st of December, 1951?

Mr. Cutler: I object on the ground it is immaterial, incompetent and irrelevant, improper, asks for a conclusion out of the mind of the witness, asking him to compare the space in his own mind. He is not qualified. It is immaterial, irrelevant and incompetent. [208]

The Court: He may answer.

A. The same type of space on the first floor of the same lean-to, published rate, six cents.

Q. What was the rental that was charged the Grand Central Aircraft Company by Tucson Airport Authority for the space that it took over that had formerly been occupied by Worcester Felt Pad Corporation?

A. Four cents.

Q. Four cents a square foot. Incidentally, I understand from Mr. Brauer you received a salary

(Testimony of Robert Schmidt.)

increase as a result of terminating or trying to terminate this lease between the Airport Authority and Worcester Felt Pad Corporation, is that true?

A. No, that is not true.

Q. Did you receive a raise in salary during the year 1951? A. Yes, sir, effective January 1.

Q. January 1, 1951? A. Yes, right.

Mr. Evans: I believe that is all.

Cross Examination

Q. (By Mr. Cutler): While you spent a lot of time in telling us about the 7500 or 8000 square feet of what you call space proper, you spent a lot of time describing some other space, but you never [209] told us somehow how much space there was. How much? A. We had lots of it.

Q. Lots of it? What does that mean, 100,000 square feet.

A. Approximately 800,000 square feet of it, yes.

Q. You mean to say that the Worcester Felt Pad, in addition to what you call the space proper they occupied, occupied another 100,000 square feet? A. No. You didn't ask me that.

Q. I did ask you that. However, how much more did they occupy on the first floor of the east lean-to when they occupied 7500 or 8000 square feet proper on the second floor?

A. After they closed out the Tech Toy line they had no additional space.

Q. Before they closed out the Tech Toy line?

A. Approximately 10,800 or 11,000 square feet.

(Testimony of Robert Schmidt.)

Q. Now, when you spoke of rates and square footages at ten cents and four cents and six cents, and all the others, you meant rate per square foot per month, did you not? A. Yes.

Q. And, for instance, ten cents per square foot per month of the space of 12,920 feet that you leased would be \$1292 per month, wouldn't it, at ten cents? A. Presumably.

Q. Can't you figure it? A. No. [210]

Q. An airport manager couldn't figure that?

A. I have to have a calculator to do that.

Q. And the four cents that you said you rented it for to the Grand Central, that is just six times the rate you rented it for to this plaintiff, isn't it?

A. On the basis of the same square footage, yes.

Q. And the six cents on the first floor that you were getting per square foot per month would amount to eight and a half times the rent you were getting up to then from the plaintiff, wouldn't it?

A. Yes, sir.

Q. Now, isn't it true that there was a discussion about the fact that the electric power lines at the airport were fairly well overloaded?

A. At what time?

Q. I am speaking now of the few weeks prior to the execution by your company, Airport Authority, defendant, to the plaintiff, isn't it true there was a discussion with you in which you said that the electric lines were considerably overloaded or near peak load or above peak load? A. No.

Q. Wasn't it true that you said to Brauer that

(Testimony of Robert Schmidt.)

you wanted to make sure that the electricity used would be very light?

A. That was because of internal conditions within the building proper, not power to the airport itself. [211]

Q. Did that have something to do with not overloading your electric current used?

A. In the area initially occupied by them?

Q. Yes, sir. A. Yes, sir, it did.

Q. Now, before I forget it, in the two moves that were made by Brauer, was it Brauer who requested he be moved around? A. No, sir.

Q. You did that for your convenience, for the defendant's convenience, didn't you?

A. Yes.

Q. And Brauer nicely acquiesced, did he not?

A. Yes.

Q. Am I right in my assumption that each time you moved Brauer it was for the sake of giving his space to Grand Central?

A. That is correct, yes, sir.

Q. And you knew, of course, that the lease had a clause by which Brauer could assign to any satisfactory tenant, didn't you? A. Yes.

Q. And, of course, having been a landlord for considerable space with Grand Central, Grand Central was a satisfactory tenant at that time, wasn't it? A. Yes.

Q. Did you tell Brauer that under his lease he was entitled [212] to assign or sub-let to Grand

(Testimony of Robert Schmidt.)

Central and make the increased rate that Grand Central was paying for himself?

A. I didn't feel it was necessary.

Q. I didn't ask you whether you thought it was necessary. I asked you whether you told him?

A. No.

Q. So you knew that when you were getting six times Brauer's rent for Brauer's space that you were making that additional money which your lease required you to give to Brauer, didn't you?

A. We didn't make any money on the transaction.

Q. I didn't ask you that, and if you want me to I will have the question read again for you. Please, Mr. Stenographer, with the Court's permission, would you read him the question?

(The last question was read as follows:

"Question: So you knew that when you were getting six times Brauer's rent for Brauer's space that you were making that additional money which your lease required you to give to Brauer, didn't you?")

The Court: He answered he didn't make any money.

Mr. Cutler: That isn't what I asked him.

The Court: You did. You asked: When you were receiving this you were making money——

Mr. Cutler: I didn't ask him if he was making money at all. May I have the question re-read, please. I didn't say a word about his making money. [213]

(Testimony of Robert Schmidt.)

The Court: Didn't you say "you were making that additional money?"

Mr. Cutler: If I did, I was mistaken. I mean he was taking money that belonged to Brauer.

The Court: That isn't what you asked him.

Mr. Cutler: Well, forgive me. Under the assignment clause if a tenant was satisfactory, and Grand Grand Central you said was satisfactory, Brauer had a right to the advantage of sub-letting or assigning his lease to Grand Central, didn't he?

Mr. Evans: We object to that, if the Court please. The lease speaks for itself——

Mr. Cutler: This is cross examination.

Mr. Evans: He is asking the witness for a conclusion as to the legal effect of the lease.

The Court: It has been asked and answered before.

Q. (By Mr. Cutler): You knew that under the lease you were getting from Brauer \$100 a month, didn't you? A. Right.

Q. And you knew that under the lease you were getting from Grand Central six times that much, didn't you? A. No.

Q. Didn't you tell the Court and the jury that you were renting this property to Grand Central that Brauer occupied for four cents per square foot per month? [214]

A. That arrangement——

Q. Is that what you told the Court and jury? Did you?

(Testimony of Robert Schmidt.)

A. I can't answer the question without qualifying it.

Q. You can't answer what you told the Court and jury within the half hour, can't you answer that?

A. Not without qualifying it.

Q. You mean you have no recollection?

A. I can't answer the question without qualifying it.

Q. Can you answer the question as to whether you have any recollection what you said on the stand within a half hour? You are not on the stand a half an hour. Can you answer that question?

A. Yes.

Q. And your answer to the question whether you have any recollection to what you said is you do recollect?

A. Yes.

Q. Do you recollect, then, telling the Court and jury that you rented the space occupied by Brauer to Grand Central for four cents a square foot per month? "Yes" or "No."

A. After the Brauer lease was cancelled.

Q. Answer "Yes" or "No," please.

A. Yes.

Q. And wasn't four cents a square foot approximately six times the \$100 a month that Brauer was to pay you for the same space under the lease for the next nine years and seven months [215] except for the increase of \$25 a month or \$300 a year for the last six years of the nine years and seven months to go, isn't that right?

A. Yes.

Q. And you were aware of the fact that the

(Testimony of Robert Schmidt.)

lease signed by you in evidence had an assignment clause in it that we have read to the jury? Were you aware of it? A. Yes, certainly.

Q. Now, Mr. Schmidt, you knew Colonel Pattillo? A. Yes.

Q. How long have you known him?

A. I met him some time during the month of September, 1949.

Q. So that you met him before he came to your place?

A. No, I met him on the Tucson Airport.

Q. Is my memory wrong, I thought he had said—I may be entirely mistaken, and I offer that to you—that he had come to the airport in August, 1951?

A. He may have but I wasn't at the airport all the time during the month of August. I was on vacation along in there.

Q. I am not speaking of that. I don't want to be unfair. You are speaking of '49 and my memory, he said he didn't get there until '51.

A. Pardon me, 1951, that is right. That is an error of mine.

Q. So that you first met him in August or September of 1951? A. Yes, sir. [216]

Q. And you mean that at the time the letter of September 26, 1951, now in evidence was written by him you had only known him a few days?

A. At best, yes.

Q. You had never met him before?

(Testimony of Robert Schmidt.)

A. I had not met him prior to his coming to Tucson and the airport. I knew his predecessor.

Q. And who was that?

A. A man by the name of Duckworth.

Q. Was Duckworth a higher officer in rank?

A. No, sir. My understanding of it was that he had the same position held and now held by Colonel Pattillo.

Q. I support the fact that he called you Bob within a few days, the fact out West you are a little more informal than we are in the East?

A. I have been called worse on shorter notice.

Q. I don't think Bob is such a bad name, as a matter of fact, I think it is a better name than mine.

No further questions.

Redirect Examination

Q. (By Mr. Evans): One question I neglected to ask you previously. Do you recall having the conversation with Mr. Brauer along in January, 1952, after the Worcester Felt Pad Corporation had vacated the [217] airport premises?

A. Well, sometime, generally speaking, around the first of the year, yes.

Mr. Cutler: May I have the question, please?

(The last question was read.)

Q. (By Mr. Evans): That took place at your office, did it? A. Yes.

Q. Was there anyone present besides yourself and Mr. Brauer? A. Not that I recall.

(Testimony of Robert Schmidt.)

Q. Will you relate that conversation to the best of your recollection?

A. Mr. Brauer told me that he had been put to considerable expense in connection with the establishing of the operation in Tucson, and with the withdrawal of his company from operation in this trade area with Tucson as a production and shipping point. As I recall it, he asked me what I thought his chances were of securing some reimbursement toward satisfying those costs. And as I recall it, at that time I felt that anyone——

Mr. Cutler: I object to——

The Court: Just the conversation.

A. Well, I expressed myself with feeling, let me put it that way.

Mr. Cutler: That is a legal way.

A. (Continuing) Anyone that believed they had a claim [218] against us were certainly entitled to file such a claim and if such a claim were presented that it would receive due and proper consideration.

Q. Was there any discussion with Mr. Brauer on that day about a rental that the Airport Authority was receiving from Grand Central?

A. I don't recall that there was, but there could have been.

Q. Do you recall telling Mr. Brauer at that time that the Airport Authority was receiving \$1300 or \$1400 a month from Grand Central for the space that had previously been occupied by Mr. Brauer's company?

(Testimony of Robert Schmidt.)

A. I couldn't have told him that because that wasn't a fact.

Q. Did you have any discussion with Mr. Brauer on that occasion concerning a salary increase you had received?

A. I don't recall having discussed my salary with any of the tenants at any time.

Q. Mr. Schmidt, what in dollars and cents did Tucson Airport Authority receive in rent from Grand Central Aircraft Company for the space that had formerly been occupied by Worcester Felt Pad Corporation?

Mr. Cutler: I object. If the question is what did they receive for 12,920 feet I have no objection; if the question is directed to a smaller amount, I object on the ground it is incompetent, immaterial and irrelevant.

The Court: Is that your question? [219]

Mr. Evans: My question was for the space that the Grand Central took over that had been occupied by Worcester Felt Pad Company at the time it was given notice to vacate the premises.

Mr. Cutler: I would like first to have identified how much that space was.

Mr. Evans: It has been testified they had 7500 or 8000 feet.

Mr. Cutler: I don't think the fact they used the 7500 or 8000 feet of their 12,920 means you can base any damage on that at all. They were entitled to the full use of their 12,920 and if they only used 100 feet of it, if you put them out they are still

(Testimony of Robert Schmidt.)

entitled to the fair rental value of the premises for the amount of space set forth in the lease. That is what I thought, you were directing your question to that point. I respectfully submit to your Honor that the question is 12,920.

The Court: I will let him answer the way it is asked then you can bring it out.

Mr. Cutler: Thank you, sir, for your fairness.

A. For the space occupied on the second floor they paid the rate of four cents, which is, as I recall it—you are speaking of Grand Central, as I recall the question—which would have been about the same area, would have been about two, about \$300 a month.

Q. (By Mr. Evans): And the lease to Grand Central was on a [220] month to month basis?

A. Right.

Mr. Evans: That is all.

Recross Examination

Q. (By Mr. Cutler): Is that the best you are able to say about it, about \$300 a month?

A. I don't recall the exact square footage.

Q. Don't you recall you signed an answer in this case? I want to be sure of that statement before I make it. Let me see the answer, please.

The Court: The answer is signed by counsel.

Q. Did you see this answer before counsel put it in?

Mr. Cutler: Is the answer deemed to be in evi-

(Testimony of Robert Schmidt.)

dence without putting it in? I assume it is. All right, sir.

Q. You saw it? A. Yes, sir.

Q. There you put the amount as precisely 299.50, is that right? A. It says 299.20.

Q. I beg your pardon, that is even more precise, 299.20. Now, 7500 feet times four cents is 300, isn't it? A. That is right.

Q. And 800 is 320? [221] A. Right.

Q. Does that indicate to you it was slightly under 7500 square feet? A. Yes.

Q. But the plaintiff was entitled under its lease to occupy 12,920, was it not? A. Certainly.

Q. It isn't your claim that if the plaintiff only had been using 7500 square feet at one time that he lost the right to use the balance of the property demised to him under his lease, is it? A. No.

Q. Now, when you spoke with him, I believe you said in January, and that would probably be of '52, wouldn't it, Mr. Schmidt? A. Yes.

Q. Didn't you say you thought his claim was justified and he ought to be paid back his expenses? "Yes" or "No." A. No.

Q. And didn't you tell him that one of the other directors, Stofft, had also likewise expressed himself that he ought to be paid his expenses?

A. No.

Q. And wasn't there another director named Levy of the airport defendant who had expressed himself as thinking the [222] plaintiff ought to get back his expenses at least?

(Testimony of Robert Schmidt.)

A. Not to my knowledge.

Q. And you didn't make the definite statement that you were sure the airport was going to give him back at least his expenses?

A. I wouldn't dare make such a statement.

Q. But you didn't make it? A. No.

Mr. Cutler: That is all.

Redirect Examination

Q. (By Mr. Evans): This four cents a square foot Mr. Cutler is asking about to arrive at this \$300 a month or so, how was that figure established by the Airport Authority, Mr. Schmidt?

Mr. Cutler: I don't think that is material to this case. The fact is there.

The Court: Objection sustained.

Q. Who established it, did you establish it yourself?

Mr. Cutler: I think that is immaterial and irrelevant. The fact is it was paid.

The Court: The objection is sustained.

Mr. Evans: No further questions.

Mr. Cutler: That is all.

The Court: At this time, Ladies and Gentlemen, we will [223] take a recess for fifteen minutes. During the recess please bear in mind the admonition heretofore given you.

(Recess.)

The Court: You may proceed.

FRED STOFFT

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Thompson): State your name for the record, please. A. Fred Stofft.

Q. Where do you reside, Mr. Stofft?

A. 2155 East Hampton, Tucson.

Q. Tucson, Arizona. Do you occupy any official position at the Tucson Airport Authority?

A. I am vice president of the Board of Directors, sir.

Q. Were you a member of the Board of Directors in the year 1951 and prior thereto?

A. Yes, sir.

Q. How long have you been a director?

A. Since the Airport Authority was established in 1948, I believe.

Q. And the Airport Authority is the one that has the lease [224] on and operates the Tucson Municipal Airport, is that right?

A. Yes, sir.

Q. And it does engage in the rental of portions of that property? A. Yes, sir.

Q. Who fixes the rental rate for the property?

Mr. Cutler: I object as immaterial.

The Court: He may answer.

A. The rental rates were fixed and established by the Board of Directors.

Q. And they are available to the general public?

(Testimony of Fred Stofft.)

Mr. Cutler: I object as immaterial, irrelevant and incompetent, having no bearing on this issue.

The Court: I don't see the materiality. As far as the expert witnesses for the plaintiff are concerned, I believe they testified they made no effort to get them, if I am correct in that.

Mr. Thompson: I believe that is correct, your Honor. Your Honor ruled it is not admissible then?

The Court: The objection is sustained.

Q. (By Mr. Thompson): Did you, Mr. Stofft, sometime after December of 1951 or after the middle of December, 1951, ever have a conversation with Mr. Brauer, president of Worcester Felt Pad Corporation? A. Yes, sir. [225]

Q. Did you have more than one conversation to the best of your recollection?

A. Yes, to the best of my knowledge there were several.

Q. And where were those conversations had?

A. I believe they were in my store on East Pennington.

Q. Who else, if anybody, if you recall, was present?

A. There were other people in the store but none within earshot that I know of.

Q. Were the conversations you had with Mr. Brauer about the same matter or were there different subjects discussed?

A. There were several subjects discussed. The purpose of his coming in, I think, was one matter.

Q. It was in connection with a claim he was

(Testimony of Fred Stofft.)

making against the airport because of his removal from the airport, as he said? A. Yes, sir.

Q. And did you at any time during those discussions tell him what rent was being paid by Grand Central for the space previously occupied by him? A. No, sir.

Q. Did you yourself know? A. No, sir.

Q. Did you have any discussion with him in which you stated that Mr. Schmidt's salary had been raised because of his activities in connection with the Worcester Felt Pad matter? [226]

A. No, sir.

Q. No such conversation as that occurred with you? A. No, sir.

Q. Did he tell you, Mr. Brauer tell you he thought his company should be compensated for their expenses in moving? A. Yes, sir.

Q. Did you make any statements in response to that to him?

A. None other than if he had a justifiable claim I assured him if it was presented it would be acted on and given consideration.

Q. Other than that there was no——

A. No, sir.

Q. The Tucson Airport Authority, are the directors paid? A. No, sir.

Q. It is a purely non-profit corporation?

A. Yes, sir.

Q. Operated for the benefit of the municipality?

A. Yes, sir.

Mr. Thompson: That is all.

Mr. Cutler: No questions.

ERNEST A. SAYRE

called as a witness herein, having been first duly sworn, testified as follows: [227]

Direct Examination

Q. (By Mr. Thompson): Mr. Sayre, I will ask you first if you are here in response to a subpoena?

A. Yes.

Q. What is your full name, for the record?

A. Ernest A. Sayre, S-a-y-r-e.

Q. Are you connected with the Valley National Bank in any capacity?

A. I am, assistant cashier.

Q. I will ask you in response to the subpoena served on you in this case if you produced certain bank records? A. I did.

Q. Do you have them with you?

A. Yes, sir.

Q. Will you produce them, please, Without talking about their contents will you just tell me what records you have brought with you?

A. I brought the originating ledger sheets, the first ledger sheet that was used in opening the account, and the signature card.

Q. And the ledger sheets for subsequent months?

A. Yes, up to the time the account was closed.

Mr. Thompson: If your Honor please, may I have these marked for identification with the understanding that if any [228] of them are admitted

(Testimony of Ernest A. Sayre.)

I may substitute photostatic copies at some later date?

The Court: Very well.

Mr. Thompson: Will you mark this card I have here for identification?

(Defendant's Exhibit E marked for identification.)

Mr. Thompson: And may I have those marked?

(Defendant's Exhibit F marked for identification.)

Q. Showing you, Mr. Sayre, Defendant's Exhibit E for identification, without talking about the contents now just tell me what in bank parlance it is?

A. This is the originating signature card.

Q. Of a customer, is that correct?

A. Of a corporation. You see, the cards are designated by the nature of the accounts that are opened. This particular one is a corporation signature card, the originating card.

Q. What date does it bear?

A. It shows that the initial deposit was made on March 14, 1949, for \$1,000.

The Court: Are you offering it?

Mr. Thompson: I am going to offer it now, if your Honor please.

The Court: Any objection?

Mr. Cutler: No objection.

The Court: It may be admitted. [229]

(Defendant's Exhibit E in evidence.)

Q. Calling your attention now to Defendant's

(Testimony of Ernest A. Sayre.)

Exhibit F for identification, will you tell me what they purport to me, what they are?

A. This is a bank record of this particular account. It shows the initial deposit and the activity that was carried on through, oh, I would say, there are twelve ledger sheets, from the day of the opening until the day it was closed on February 19, 1952.

Mr. Thompson: We offer these in evidence.

The Court: Any objection?

Mr. Cutler: No objection.

The Court: They may be admitted.

(Defendant's Exhibit F in evidence.)

Q. I notice that there are certain erasures on Exhibit E. What do those show or deletions, I should say, rather than erasures?

A. This card, being a corporation card proposes to show that the secretary and president of the corporation authorized three different individuals to sign against the account.

Q. And those individuals were whom?

A. The first one being Robert J. Alpert, Archer A. Brown, vice president, and finally Anne Zerikan, secretary, which was later crossed out. Undoubtedly the authority was cancelled by the corporation to sign. [230]

Q. Calling your attention then to this document which is F in evidence, first off, on the extreme left hand side up to the line under the statement "checks"—

A. That is right.

Q. —what does that purport to show?

(Testimony of Ernest A. Sayre.)

A. There are three columns. These are all checks or debits against the account.

Q. This shows checks drawn against the account, is that right? A. Yes.

Q. On the date of the checks shown?

A. Yes, the date is shown for each operation, of course.

Q. Is that on the extreme left hand side?

A. Extreme left hand side.

Q. And the deposits?

A. And the deposits would appear on the fourth column.

Q. And the date of the deposits?

A. Yes, sir.

Mr. Thompson: I have no further questions.

Cross Examination

Q. (By Mr. Cutler): Doesn't the bank usually have a corporate resolution from a corporation to authorize signatures?

A. It does. That is it. [231]

Q. Pardon?

A. That is it, that card.

Q. It says "Account opened by Black." Does that mean Mr. Black connected with your bank opened the account?

A. That is right, a bank employee, yes, sir.

Q. It says 3/14/49, that means March 14, 1949?

A. Yes.

Q. And the \$1,000 is the initial——

A. Initial opening deposit.

(Testimony of Ernest A. Sayre.)

Q. —initial opening account. And they gave you a reference. The only authorization that I can find on the back of this card, unless I am very much mistaken is Mr. Brauer could sign, or did I read that wrong?

A. Oh, yes, Julius E. Brauer. On the face of the card are the three signatures that are authorized; then on the back of the card bearing the corporation's seal, signed by the secretary. Julius E. Brauer, who is one of the two signatures on the lower authorization, his signature also appears up here.

Q. The lower authorization when the account was opened was only to Julius E. Brauer?

A. No. That was authorization given to the individual on the face of the card.

Q. Just a moment. Let's do one thing at a time, please, if you don't mind.

A. No, not at all. [232]

Q. An authorization of a corporation in order for your bank to properly honor a check, you must first have a corporate authorization or resolution authorizing such person to sign on behalf of the corporation?

A. That is right.

Q. Now, isn't it a fact that on this corporation's resolution which is on the back of this card it says: "Resolved that (blank) president," printed, not filled in, "and/or (blank) vice president," not filled in, printed, "and/or (blank) secretary," not filled in, printed, "or Julius E. Brauer, treasurer of this corporation be and they hereby are authorized to

(Testimony of Ernest A. Sayre.)

execute checks and other items for and on behalf of the corporation.” A. That is right.

Q. Now, as a banker do you agree with me that on behalf of this plaintiff corporation on the 14th day of March, 1949, when the account was opened and when the \$1,000 was put in as the initial deposit the only corporate resolution you had to authorize payment of checks was checks drawn by Brauer, signed by Brauer? A. No.

Q. Who else was authorized by this resolution to sign checks?

A. The very signatures that appear on the face of the card, otherwise we wouldn't have had those signatures affixed thereto.

Q. I don't know anything about your reasons for having [233] the signatures affixed thereto. Isn't it a fact you as a bank are required before you honor corporation withdrawals by check or otherwise, by any officer of the corporation, must have on file a resolution certified by the corporation that the named officer has the right to withdraw checks, is that true? A. Right.

Q. And the only named officer on the resolution was Brauer, is that right?

A. You are using the word “officer.” Authorized individuals.

Q. I will take that. And the only authorized individual on the resolution was Brauer, isn't that right? A. That is not right.

Q. Show me any authorization of the corporation, the Worcester Felt Pad Company, on this

(Testimony of Ernest A. Sayre.)

card that authorized anybody else to sign on behalf of the corporation?

A. On the face of the card——

Q. I didn't ask you what is on the face of the card.

A. I am telling you. "Below signed signatures of officers named in resolution are set forth on reverse hereof." This is what the bank goes by, of course. A bank will not accept a deposit nor an account without a resolution from a corporation. It is quite possible that in opening the account the clerk should have also procured the signatures on the reverse side instead of only on the front, which is all he really wanted.

Q. But the fact is you have no corporate resolution—— [234]

A. Yes, we have. There is your seal.

Q. Please, I didn't finish my sentence. The fact is that the front of the card says: "Below find signatures——" I had better start at the beginning, I might be accused of being unfair—"commercial" is in printing, meaning commercial account. I am on the first line now of the front. "Worcester Felt Pad Company" is typewritten out in full on the first line also? A. Yes, sir.

Q. That is the name of the customer or client?

A. That is right, for filing purposes.

Q. Now in printing it says on the back: "Below find resolutions of officers named in resolution set forth on reverse hereof," and it names Alpert, crosses out "president" and leaves no office; it

(Testimony of Ernest A. Sayre.)

names Archie A. Brauer, vice president; it names Anne Zerikan, some name like that, secretary, and her name is stricken out; then there is some pencil over which are the words "Account closed, February 19, 1952," then it says, "Address, 4147 East Whittier Street," written out, then it gives the name of the reference and the first deposit the representative of yours that took the account and the date March 14? A. Yes, sir.

Q. Now, I come back to the second line: "Below find signatures of officers named in resolution set forth on reverse [235] hereof." Is that right? That is printed. If I misread it I want you to tell me so.

A. Yes, that is right.

Q. Now, "Below find signatures of officers named in resolution set forth on reverse hereof." Are any of the three names set forth in the resolution on the reverse thereof? Can you answer that?

A. What is your question?

(The last question read.)

A. No, they are not. That card was sent to the corporation. If they didn't make them—we got them on the front that is where we wanted them.

Q. But the only resolution you got back from the corporation which you brought us from your files is that Julius Brauer, who has testified in this case, can sign on behalf of the company?

A. Yes, and they also procured for us the signatures on the front of that card.

Q. But no authorization?

A. I wouldn't say that.

(Testimony of Ernest A. Sayre.)

Q. Did you get any other authorization than this one, and I will finish the subject?

A. I can't say for sure.

Q. All right. Will you look in your records and find out? A. Yes. [236]

Q. Will you be good enough to let me know?

A. Yes.

Q. Thank you. I have only one other question. I am sorry to be so long winded but I wanted to get something off my chest.

Of course you don't assume to have any knowledge of what the checks were or the withdrawals or deposits were— A. Activity.

Q. I don't know what you would call it in bank parlance, activities? A. Yes.

Q. All you know is amounts, is that right?

A. That is right.

Q. For instance, if we take the first line on March 14, 1949, \$1,000 was the balance brought forth, that was the initial deposit?

A. That is right.

Q. On the second line on March 17 there are three items, \$100, \$52.30 and \$758.52 set out on the same line? A. Yes.

Q. All banks keep setting them out if there is room for it, if it is the same day?

A. That is right.

Q. You don't know what the \$100 was for?

A. No, sir. [237]

Q. You don't know whether it was for rent to Grand Central or anything else, do you?

(Testimony of Ernest A. Sayre.)

A. No.

Q. You don't know what the \$52.30 was for?

A. No.

Q. Or the \$758.52? A. No.

Q. You don't know what the deposits were for?

A. I could find out what the deposits were and detail them to you.

Q. I mean you don't know that? A. No.

Q. You are not saying that because you don't know? A. No.

Mr. Cutler: That is all.

Mr. Thompson: That is all.

ROBERT J. ALPERT

recalled as a witness, having been previously sworn, testified as follows:

Examination by Mr. Thompson:

Q. Mr. Alpert, you have been previously examined. When you first came to Tucson where did you reside? A. At 4147 East Whittier. [238]

Q. East Whittier? A. That is correct.

Q. I will ask you to state whether or not this is your signature that appears upon that card?

A. Yes, that is my signature.

Q. I say "that card" I should have said Defendant's Exhibit E in evidence, is that correct, that is your signature?

A. It looks like my signature, yes.

Q. You think it is, don't you?

(Testimony of Robert J. Alpert.)

A. Yes, it looks like my handwriting.

Q. You did write checks on the Worcester account at the Valley Bank during the time you were manager with the company here, didn't you?

A. That is correct.

Q. You had been here, I presume, some days before the bank account was opened in Tucson at least, had you not, Mr. Alpert, before the bank account was opened at the Valley National Bank?

A. I don't believe so.

Q. You think the first day you were here you went to the bank?

A. I have absolutely no recollection, sir.

Mr. Thompson: I believe that is all.

Examination by Mr. Cutler:

Q. Did you open the account yourself? [239]

A. No, I had nothing to do with opening the account.

Mr. Cutler: That is all.

Re-examination by Mr. Thompson:

Q. Mr. Alpert, you signed the signature card, didn't you, at the time it was opened?

A. I don't know when I signed the card.

Mr. Cutler: That is what I thought. That is all, Mr. Alpert.

(Witness excused.)

Mr. Evans: May we look at the exhibits here?

The Court: Very well.

Mr. Evans: At this time the defendant offers in

evidence the exhibits that are marked Plaintiff's Exhibit 6 and Plaintiff's Exhibit 7 for identification.

Mr. Clampitt: May I ask which dates those are? I believe under our pre-trial stipulation——

The Court: No objection?

Mr. Clampitt: I can't if I wanted to. I believe we stipulated they might go in.

(Plaintiff's Exhibits 6 and 7 in evidence.)

DEFENDANT'S EXHIBIT "G"

[Plaintiff's Exhibit 7 marked for identification November 30, 1953.]

[Letterhead of Department of Commerce, Civil
Aeronautics Administration]

Mr. R. F. W. Schmidt, Manager Oct. 9, 1951
Tucson Municipal Airport
Post Office Box 1191, Tucson, Arizona

Dear Mr. Schmidt:

Your letter of October 6, 1951, transmitting a copy of a letter dated September 26, 1951, from the Officer-in-Charge, Air Force Plant Office, Grand Central Aircraft Company, Gendale Region, Western Air Procurement District, is acknowledged.

The letter from the Air Force representative requests the Tucson Airport Authority to immediately make available all covered space previously occupied by Consolidated-Vultee and the Army Air Force for lease or rental to the Grand Central Aircraft Company, prime contractor of the United States.

The Tucson Municipal Airport was transferred to the City of Tucson, Arizona, by the United States Government under Agreement dated October 13, 1948. Under the terms of this Agreement the United States reserved the right during any national emergency to make exclusive or non-exclusive use of the airport or any portion thereof subject to certain enumerated conditions. The Government may exercise its right to such use by giving appropriate notice to the owning agency. In the absence of any waivers by the United States Government any leases or contracts entered into by the City of Tucson or the Tucson Airport Authority subsequent to October 13, 1948, would be subject to the rights reserved by the United States Government in said Agreement.

You have advised that the letter from the Air Force is not interpreted to be so restrictive as to require complete withdrawal of all civil functions from the structures located on the Tucson Municipal Airport. It is our opinion that the request of the Air Force dated September 26, 1951, is within the authority reserved to the Government in the aforementioned Agreement and constitutes an exercise of such authority for use of space at the airport. Accordingly, this office will interpose no objection to the granting of additional space to Grand Central Aircraft Company provided the release of such space will not affect necessary civil activities now operating from the airport. In the event the Air Force interprets its letter of September 26, 1951, to require the vacation of all covered space on

the Tucson Municipal Airport, this office desires to re-examine the issue in order to assure that essential civil activities can continue to operate at the Tucson Municipal Airport or at some suitable alternate location.

Very truly yours,

/s/ H. BROWN,

for H. A. Hook,

Chief, Airports Division

cc: Phil J. Martin, Jr., City Manager, Tucson, Ariz.

cc: Sent to Col. Pattillo and Wm. B. Birren

10/20/51—jr.

DEFENDANT'S EXHIBIT "H"

[Plaintiff's Exhibit 6 marked for identification November 30, 1953.]

(Copy)

[Tucson Airport Authority Letterhead]

Mr. H. A. Hook

October 6, 1951

Chief, Airports Division

Civil Aeronautics Administration

5651 West Manchester Avenue

Los Angeles 45, California

Dear Art:

With respect to your telegram of October 5 referring to my conversation with Mr. Winger, I believe that the attached copy of a communication from Colonel James L Pattillo of the Air Force

fairly well covers the situation. We have replied to this communication, pointing out that vacation of ALL covered space formerly occupied by Consolidated-Vultee or the Army Air Force would mean the complete withdrawal of all civil functions from the structures. We do not interpret his letter quite so strictly and neither do the representatives of Grand Central Aircraft Company.

We would like to proceed with an orderly withdrawal of some of our non-aeronautical tenants from space which the Air Force would like to have Grand Central occupy. Accordingly, I asked Mr. Winger for a copy of any directive under the President's Declaration of National Emergency which could be applied with the language of Colonel Pattillo's letter to legally terminate a lease containing the usual escape clauses. Any recommendations you may be in position to make will be deeply appreciated.

I have advised A. B. Curry, Chairman of the Airports Use Panel, of the situation but, for the present, I do not want to invoke the action of that body. I think we can solve these problems amicably if we can show that we are within our legal rights in asking certain non-aeronautical, non-defense tenants to cease their occupancy without compensation.

Yours very truly,

R. W. F. Schmidt,
Manager

RWFS:jr—Enc.

Mr. Evans: Defendant rests, if the Court please.

The Court: Any rebuttal?

Mr. Clampitt: Yes, I believe so, if the Court please.

No rebuttal. Plaintiff rests. [240]

The Court: Very well.

Mr. Evans: The defendant would like to make a motion, if the Court please.

The Court: Very well, Ladies and Gentlemen, counsel have urged some law matters on the Court so at this time I will have to ask you to retire again. I can't say for sure how long it might be but so that you have some freedom of movement I will tell you we will recess at this time until 4:30, but please don't come back into the courtroom until the bailiff tells you that you may. During the recess please bear in mind the admonition heretofore given you.

(Jury retires from courtroom.)

Mr. Evans: The defendant moves at this time, if it please the Court, for an order instructing the jury to return a verdict in favor of the defendant, upon the grounds that the plaintiff, now that all the evidence is in, has failed to prove the essential allegations of its complaint by any competent evidence, in that there is no competent evidence of fraud on the part of the defendant, that there is no competent evidence from which a constructive eviction of the plaintiff by the defendant from the premises described in the plaintiff's complaint is in the record, and upon the additional grounds that the evidence conclusively shows at this stage of the proceedings that the plaintiff company is a corpora-

tion incorporated in Massachusetts, that it has never qualified to do business within the State of Arizona in accordance with the laws of the State of Arizona, and that all the time from the time it executed the lease upon which this action is based until the time it withdrew from the premises of the Tucson Municipal Airport was engaged in doing business within the State of Arizona. And that as a result of its failure to comply with the statutory provisions for foreign corporations in this state, that its acts done in this state, including the execution of the lease which is the basis of this action, were and are completely void.

Mr. Clampitt: May it please the Court, let's take these matters up——

The Court: I am going to ask you, Mr. Clampitt, to direct your answer to counsel's motion or discussion to the point he made last, in other words, the proposition that the evidence discloses that the plaintiff is a Massachusetts corporation, never been licensed or qualified to do business in the State of Arizona, and that it has done business, entered into this lease and thereafter carried on a course of conduct in business, which counsel contends under the statute makes all their acts in the state void.

(Argument presented by counsel.)

The Court: In this matter I have the proposition, based upon the Arizona statutes and the Arizona authorities as I know them, and I have read them all, read them very carefully; I have also examined the other authorities in states having statutes like Arizona, and I come to the conclusion

that the Arizona courts with the evidence before this Court here would hold that this corporation was doing business in Arizona without having qualified under its laws and that all of its acts are void. I pointed out to counsel this morning in chambers the authority on which I base that. That was my view then and there has been nothing developed in the argument that has changed my view of it. And this being a diversity case, in other words, it is in this court merely because of diversity of citizenship, and the Supreme Court has said on this very point, that is the validity of acts done by a corporation which hasn't qualified, the Supreme Court has said the Federal Court is to apply the law of the State and if the doors of the State Court would be closed to a litigant in the facts of the case, then the doors of the Federal Court are also closed to him. On that basis the motion for directed verdict will be granted.

Call the jury in about two minutes.

(Jury returns to courtroom.)

The Court: Ladies and Gentlemen, it is the rule whenever in the trial of a case when the evidence is all in, the evidence in such case, and in the judgment of the Court there can be but one verdict rendered in the case, that, as a matter of law, it is the Court's duty to direct the verdict which the Court feels the evidence requires. That situation has arisen in [243] this case, so I have prepared a form of verdict in favor of the defendant in this case and against the plaintiff and I will ask you, sir, if you will, to sign that verdict as foreman.

Mr. Clampitt: If the Court please, may we at this time to protect our record, should we make any exception?

The Court: No, there is automatic exception.

Mr. Clampitt: That includes the motion for directed verdict?

The Court: Yes. I will ask the clerk to read and record the verdict.

(Verdict read and recorded.)

The Court: That will conclude your services in the case, Ladies and Gentlemen. At this time you will be excused subject to further call. I want to thank you before you leave for the patience and earnestness with which you have considered the case. You may retire.

Mr. Evans: May the Court entertain a motion at this time that judgment be entered in accordance with the verdict?

The Court: We will permit the jury to retire.

(Jury retires from courtroom.)

Mr. Evans: At this time, may it please the Court, the defendant moves that judgment be entered in accordance with the verdict of the jury.

The Court: On motion of the defendant there will be an [244] order for judgment in accordance with the verdict of the jury; that the plaintiff take nothing by its complaint.

Mr. Clampitt: May I ask the Court, in view of the way this matter has arisen, it occurs to me this is not a proper case for the costs to be assessed against the plaintiff here. This matter was brought up during the trial and it occurs to me it is quite

unfair to ask the plaintiff to be assessed. I believe under the present rule this Court has power to assess costs as it deems proper.

The Court: That matter will arise whenever counsel claim costs by serving a statement in writing on you; at that time if you desire to object to the taxing of costs you may follow the rule that provides how that may be done. Stand at recess.

[Endorsed]: Filed July 27, 1954.

[Endorsed]: No. 14462. United States Court of Appeals for the Ninth Circuit. Worcester Felt Pad Corporation, a corporation, Appellant, vs. Tucson Airport Authority, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed: July 31, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14462

WORCESTER FELT PAD CORPORATION, a
Massachusetts Corporation, Appellant,

vs.

TUCSON AIRPORT AUTHORITY, an Arizona
Corporation, Appellee.

STATEMENT OF POINTS

Pursuant to Rule 19 (6) of the Rules of Practice of the above-entitled court, the appellant hereby states the points on which he intends to rely, as follows:

1. The District Court erred in directing a verdict against the plaintiff and in favor of the defendant.
2. The District Court erred in refusing to submit the case to the jury.
3. The District Court erred in holding that as a matter of law plaintiff was not entitled to recover.
4. The District Court erred in entering final judgment in favor of defendant.
5. The District Court erred in directing a verdict for defendant upon motion of the defendant.
6. The evidence introduced at the trial was of such character concerning the making of the lease that the plaintiff was clearly entitled to go to the jury on the question of the validity of the lease

itself, and for that reason the action of the trial court in instructing the jury to return a verdict in favor of the defendant invaded the province of the jury.

Dated August 21, 1954.

C. WAYNE CLAMPITT,

A. S. CUTLER,

/s/ By C. WAYNE CLAMPITT,

Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 24, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Pursuant to Rule 19 (6) of the Rules of Practice of the above-entitled court, the appellant hereby designates the following parts of the record as material to the consideration of the appeal:

1. Court Docket Entries.
2. Entire record transferred from the United States District Court for the District of Arizona by District Clerk of Court and filed in the above entitled cause, including all docket entries, all pleadings, all Minute Entries, including court's Direction of Verdict, Verdict, all Exhibits, Plaintiff's Motion

for New Trial and Minute Entry denying Notice of Appeal and Stipulation designating Record, Reporter's Transcript, Stipulation and Order Extending Time to File Record, Statement of Points and this Designation.

Dated August 21, 1954.

C. WAYNE CLAMPITT,
A. S. CUTLER,
/s/ By C. WAYNE CLAMPITT,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 24, 1954. Paul P. O'Brien,
Clerk.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WORCESTER FELT PAD CORPORATION,

Appellant,

v.

TUCSON AIRPORT AUTHORITY,

Appellee.

BRIEF FOR APPELLANT

A. S. CUTLER OF NEW YORK AND
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Tucson, Arizona,
Attorneys for Appellant.

FILED

DEC 16 1933

PAUL P. O'BRIEN,
CLERK

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WORCESTER FELT PAD CORPORATION,

Appellant,

v.

TUCSON AIRPORT AUTHORITY,

Appellee.

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal by Worcester Felt Pad Corporation, a Massachusetts corporation, from a judgment of the District Court for the District of Arizona ordered to be entered and filed on December 9, 1953 (Trans. 30). Jurisdiction of the District Court was invoked by reason of the diversity of citizenship of the parties involving an action upon a written lease with the amount in controversy exceeding \$200,000.00 (Trans. 9).

Statement of the Case

This is an appeal by plaintiff-appellant from a judgment dismissing plaintiff's Complaint on December 9, 1953 and the Order denying plaintiff's Motion for a New Trial dated March 24, 1954 (Trans. 31-32). The case was tried before the Hon. James A. Walsh and a jury on the 8th and 9th days of December, 1953.

The Action

Plaintiff-appellant leased from defendant-respondent a portion of an airplane hangar situated on the Tucson Municipal Airport in Pima County, Arizona. The lease was for twelve years (Trans. 13-18).

The Federal Government deeded the airport after World War II to the City of Tucson for nothing. There was a recapture clause that if the Government required the property in the event of a national emergency, it could be re-taken on thirty days' notice.

The City of Tucson deeded the property to the defendant-respondent with the same recapture clause.

The lease from the defendant-respondent, Tucson Airport Authority to plaintiff-appellant contained a thirty day cancellation clause in the event if either party was deprived of its use of the leased premises by Government action in the event of a national emergency (Trans. Par. (4) 15-16).

On October 18th, 1951 respondent mailed the appellant a registered letter (Trans. 80-82). Respondent in writing represented: "The Federal Government requires the use of certain covered space on Tucson Municipal Airport which includes all of the space now occupied by you." This representation is false. The letter then undertook to give the thirty day notice to vacate, provided for under the lease.

The appellant relied upon this representation and surrendered the property when the lease still had nine years and seven months to run.

Thereafter plaintiff-appellant discovered respondent's fraud.

Instead of the Federal Government having recaptured the property without payment as it had a right to do, respondent Tucson Airport Authority had negotiated a lease

for appellant's space at \$1,400 a month instead of \$100 a month, the demised rental.

This despite a clause in the lease which reserved the right to appellant to assign to any other person of adequate financial responsibility.

This suit upon the written lease is for damages sustained by reason of defendant-respondent's fraud. The claim for business losses was withdrawn at the trial. That leaves damages on the lease suffered by appellant which are readily ascertainable. They are merely the difference between \$1,400 a month received by respondent concededly and the \$100 required by the lease, or \$1,300 a month for nine years and seven months, or \$149,500. There is evidence in the record by two well-known real estate experts, J. Leslie Hansen of Phoenix, Arizona, and Mark H. Klafter of Tucson, Arizona which fully supports the difference in the rental value even if respondent had not actually received that difference from the Grand Central Aircraft Company, the new lease. (Hansen's testimony of a difference of \$1,292 a month, Trans. 94 *et seq.*), and Mr. Klafter's testimony of 10¢ per square foot per month, or \$1,300 a month difference, (Trans. 121 *et seq.*).

The case was fully tried. There was no defense of illegality in the pleadings. At the pre-trial hearing no such defense was suggested or intimated.

Near the close of the case, respondent moved to amend the answer to allege that the lease was void because appellant had not procured a certificate of doing business in the State of Arizona. Respondent's counsel puts it: "As a result of its failure to comply with the statutory provisions for foreign corporations in this state, that its acts done in this state, including the execution of the lease which is the basis of this action, were and are completely void." (Trans. 242).

The Court granted the motion and dismissed on that ground.

The question presented on this appeal:

Is a suit on a lease, valid when made, rendered void by the subsequent doing of business by the lessee?

* * * * *

SPECIFICATION OF POINTS AND ERRORS ON THIS APPEAL

* * * * *

POINT I

The mere signing of a lease in not doing business within the state, any more than the act of owning real estate or any other single act is doing business in the State.

POINT II

The testimony is clear and unchallenged that when appellant acquired the lease it was for investment and not to do business. This testimony respondent does not contradict by any evidence. The fact that appellant thereafter decided to do business in the leased premises did not forfeit appellant's property rights to the lease.

POINT III

Though appellant would be prevented from suing to recover for business done without a foreign corporation license, appellant was not automatically deprived of its property rights, namely the lease, any more than of any other property it owned simply because it subsequently did business in the State of Arizona without a license.

POINT IV

Appellant demanded a trial before a jury. The Trial Court undertook to determine a disputed question of fact by directing the jury to find for the defendant.

ARGUMENT

POINT I

The mere act of signing a lease is not doing business within the State, any more than the act of owning real estate is doing business within the State.

The Arizona statute requiring foreign corporations to fulfil certain requirements to do business in the state is found in Sections 53-801 and 53-802, Arizona Code Annotated, 1939. This law is set out in full below.¹ Although slightly changed through the years with numerous code revisions, in all essentials it is the same today as during Territorial days. On our first main point stated above, there are six Arizona decisions.

¹ The Arizona statute in effect when the matter arose reads as follows:

“53-801. Requirements to do business in this state—Corporations excepted.—Any foreign corporation, before entering upon, doing, or transacting any business, enterprise, or occupation, in this state shall:

File a certified and authenticated copy of its articles of incorporation or charter with the corporation commission of this state;

Publish its articles of incorporation and file affidavit thereof as required of domestic corporations;

Appoint in writing, over the hand of its president or other chief officer, attested by its secretary, a statutory agent in each county in this state in which such corporation proposes to carry on any business as required of domestic corporations;

Pay a license fee of fifteen dollars (\$15.00) to the corporation commission, and obtain from said corporation commission a license to do business in this state.

This section, however, shall not apply to insurance corporations, nor to any foreign corporation, the only business transaction of which, within the state, shall be the loaning of funds to religious, social or benevolent associations, or corporations organized for purposes other than profit.

53-802. Acts void unless statutes complied with.—No foreign corporation shall transact any business in this state until it has complied with the requirements of the preceding section, and every act done by said corporation prior thereto shall be void.”

The earliest Arizona case, *Babbitt v. Field*, 6 Ariz. 6; 52 P. 775, declared:

“The doing of a single act of business in the territory by a foreign corporation does not constitute the carrying on of a business within the reasonable construction of the provisions of the chapter relied upon.”

This decision cited *Manufacturing Co. v. Ferguson*, 113 U. S. 727; 5 C. C. 739; 28 L. ed. 1137, where a similar construction was made.

Martin v. Banker's Trust, 18 Ariz. 55; 156 P. 87, the second Arizona case, cited the Babbitt case with approval and said:

“Obviously the reasonable construction of the Arizona statute is not merely the beginning of any business, enterprise or occupation which renders every act * * * void, but it involves the idea of the pursuit of it, or carrying on the business * * *.”

The third case, *Nicolai v. Sugarman Iron & Metal Co.*, 23 Ariz. 230; 202 P. 1075, cited the Babbitt case as controlling and once again declared that a single act of business is not under the ban.

The fourth Arizona case, *Monaghan & Murphey Bank v. Davis*, 27 Ariz. 532, 234 P. 818, cited the three previous Arizona decisions and said:

“The consensus of these three cases is that, to come within the statute, a corporation must be engaged in an enterprise of some permanence and durability, and must transact within the state some substantial part of its ordinary business, and not merely a single act.”

It is interesting to note that the decision of the lower Court was reversed because of its failure to properly instruct the jury on this point.

The next case, *McKee v. Stewart Land & Livestock Co.*, 28 Ariz. 511; 238 P. 326; quoted the Monaghan case just cited with approval and held that amendments made in the law up to and including the 1913 Ariz. Code, did not change this interpretation or prohibit the doing of a single act.

The case of *National Union Indemnity Co. v. Bruce*, 44 Ariz. 454, 38 P. (2nd) 648, reviewed the five preceding Arizona decisions on this point as well as two other decisions on closely connected questions and re-stated the same rule holding that minor changes appearing in the 1928 Ariz. Code did not alter the general rule set out in these earlier cases.

If one or two isolated transactions do not constitute doing business (*National Regulator Co. v. Abco Boiler Corp.*, (D. C.), 42 F. 2, 712, affd. in the Circuit Court of Appeals, 42 F. 2, 713; *McMillan Process Co. v. Brown*, (Cal.), 91 Pac. 2nd 613), one isolated transaction of signing a lease certainly does not constitute doing business (*International Fuel and Iron Corp. v. Donner Steel Co.*, 242 N. Y. 224; *Dell v. City of New York*, 200 N. Y. Sup. 705; *Gumbinski Bros. Co. v. Smalley*, 197 N. Y. 530).

POINT II

The testimony is clear and unchallenged that when appellant acquired the lease it was for investment and not to do business. This testimony respondent does not contradict by any evidence. The fact that appellant thereafter decided to do business in the leased premises did not forfeit appellant's property rights to the lease.

Appellant's president had been in Tucson many times prior to the lease dated March 1st, 1949. He had been coming to Tucson for the past eight years for the winter months (Trans. 212).

He had in mind at the time that this was a terrific deal, a good deal at \$100 a month for 13,000 square feet (Trans. 214).

He thought he might use it, the lease, for Tech Toys, a subsidiary of his (Trans. 214). That is why he insisted upon the privilege of subletting his space to suitable tenants (Trans. 215).

It was upon his insistence such a clause was put in the lease. As he testified (Trans. 217): "My thought behind that was here was a lease I was getting at a very low price and it looked to me that there was a good opportunity to sublet it at an advantageous rate to someone else. At first I had in mind Tech Toys. Then I also considered the other factors, possibly people coming into town and wanting space."

He did not make up his mind to go ahead with the manufacturing operation himself until the end of March (Trans. 218). The lease did not require him to pay rent until June 1st, 1949 (Trans. 218).

So the naked question may be thus summarized:

The making of the lease on March 1st was absolutely valid and was not doing business within the state. At the time appellant did not know what he would do with the property. It looked like a good investment and that's why he leased it with the privilege of subletting upon which he insisted.

The courts of other states have had this problem before them and the case of *Wulfg v. Armstrong Cork Co.*, (Mo.), 157 S. W. 615, would seem to be in point. In that case the Court said:

"The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the state; it is not bound to establish itself here before it can obtain such a contract. Entering into

a contract like the one in question undoubtedly is 'transacting business' within the unlimited meaning of the term; but that is not the sense in which the term is used in the statute just quoted. As there used, it means the carrying on the work for which the corporation was organized—''

Considering the number of times it has been cited by other courts, the case of *General Conference of Free Baptists v. Berkey* (Cal.), 105 P. 411, would seem to be a leading case and in that decision, the Supreme Court of California said:

"There have been many decisions construing the words 'doing business' under such statutes, and the cases are not in harmony. In most jurisdictions it is held that such statutes have reference to a continuation in some form of business, and do not apply where a foreign corporation does a single act of business within the state. 3, Clark & Marshall on Private Corporations, Sec. 846, and cases cited. There are decisions, however, which hold that a foreign corporation may come within the purview of such statutes by the doing of a single act. See, for example, *Farrior v. Security Co.* 88 Ala. 275, 7 South 200. But even in the states which announce this doctrine it is held that the single act which will bring the corporation within the purview of the statute must be an act of the ordinary business of the corporation. * * * This corporation was certainly not engaged in the buying and selling of land * * *. A distinction is to be drawn between the purposes of a corporation and its powers * * *. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends."

The general principle established by the cited cases is summarized by the text writers as follows:

“Where a foreign corporation has not engaged in its general business in the state, but has done only those acts which are preliminary to the doing of the business for which it was incorporated, such acts will not be regarded as the doing of business in the state.”

Fletcher Cyc. Corps. Permanent Ed. Vol. 17 Sec. 8468 pp. 475-8 and cases cited.

A similar statement of the general law will be found in 20 C. J. S. “Corporations” Sections 1831-2 pages 50-51 and in 14A C. J. “Corporations” Sections 3986-3989, pages 1279-1280.

Although Alabama’s Supreme Court has been classified by text writers as following the “strict” line in interpreting its statutory ban on “engaging or transacting any business” by a foreign corporation, it is interesting to note that the case that perhaps comes closest to our exact fact situation was decided by that court in conformity with appellant’s contentions. The case of *Friedlander Bros. v. Deal*, 118 So. 509, holds that a foreign mercantile corporation in leasing a store building in that state in order that it might thereafter engage in its ordinary business was not in violation of the law of Alabama and its lease was not invalid although it never did comply with the law of that state. Since it is clearly in point, Appellant earnestly urges this Court to read that opinion in full.

Although concerning a deed, rather than a lease, another California case seems to clearly demonstrate the true rule. In *Davies v. Mt. Gaines Min. & Mill. Co.*, 286 P. 740, the plaintiff sued to set aside a deed because the defendant, a foreign corporation, had not complied with the California law before acquiring the property. In support of this contention, a number of Wisconsin cases were cited, based upon that state’s statute

“* * * which reads as follows: ‘No foreign corporation shall transact business or acquire hold or dispose

of property in this state unless it shall have first complied with the requirements of the statute', etc., St. Wis. 1927, Sec. 226.02. To this the respondent interposes the unanswerable argument that the Corporation Act of the State of California does not and has not, since 1921 (St. 1921, p. 638), required the filing of certified copies of its articles of incorporation, or other papers, prior to the acquiring or conveying of real estate in California."

Appellant here points out that Arizona has never imposed this requirement and the last cited case seems clearly in point.

POINT III

Though appellant would be prevented from suing to recover for business done without a foreign corporation license, appellant was not automatically deprived of its property rights, namely the lease, any more than of any other property it owned simply because it subsequently did business in Arizona without a license.

It has been long settled that valid contracts are property and as such are protected under the Constitution; *Lynch v. United States*, 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840 and corporations have the same property rights as individuals *Pierce v. Society of Sisters*, 268 U. S. 510; 69 L. ed. 1070; 45 S. Ct. 571; 39 A. L. R. 468. The plaintiff then owned a lease which was a valid and valuable piece of property when acquired.

Under the law of Arizona, the rights of a tenant under a lease are recognized and protected by the courts like any other property right. See:

Genardini v. Kline, 19 Ariz. 558; 173 P. 882;
Woodward v. Fox West Coast Theatres, 36 Ariz.
 251; 284 F. 350;

Karam & Sons Mercantile Co. v. Serrano, 51 Ariz. 397; 77 P. (2nd) 447;
Jamison v. Franklin Life Ins. Co., 60 Ariz. 308; 136 P. (2nd) 265.

It would appear clear from the points already made that the appellant acquired control of a valuable piece of real estate in a valid and lawful manner, and thereafter did business there invalidly. Should that take from him his right to the ownership of this property? Could anyone take it from appellant without recompense? Is it not more reasonable to say that the later illegality of its acts and its business makes an action concerned with that business unenforceable?

“It is a well established principle of statutory construction that penal statutes must be strictly construed in determining the liability of the person upon whom the penalty is imposed, and that the more severe the penalty, and the more disastrous the consequence to the person subjected to the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law.” *Suth. Stat. Const. Sec. 322; Potters Dwarris*, 244.

Missouri, K. & T. R. Co. of Texas v. State, 100 Tex. 420; 100 S. W. 766 (p. 767).²

Forfeitures are not favored, and they should be enforced only when within both letter and spirit of the law.

“Forfeitures” Key No. 1, Am. Digest System and cases cited thereunder.

² See also:

State v. Blaisdell (Me.), 105 Atl. 359;
Denver & R. G. R. Co. v. Frederick (Colo.), 140 P. 463;
Boott Mills v. Boston & M. R. R. (Mass.), 106 N. W. 680;
Clymer v. Zane (Ohio), 93 A. L. R. 1245;
Kitts v. Kitts (Tenn.), 189 S. W. 375.

On that one question, Appellant by assigning the lease, as he had the right to do, did not have to continue doing business or indeed ever begin doing business in the State. He was entitled to the rent the sub-tenant paid, namely \$1,400 a month, for the balance of the nine year seven month period.

Perhaps it can be stated in another way.

While appellant could not risk doing business in the State, without perhaps being unable to recover on those business transactions, there was nothing in the world that prevented him from gaining the advantage of his solemn contract. That required no doing of business. That contract gave him the privilege of sub-letting and the increased rental was his, not the landlord's.

That advantage could not be summarily pirated by the landlord on the theory that he was doing business. It required no doing of business to assign or sublet, as this lease gave lessee the right to do.

Profiting by the difference under his contract as a reward for his foresight in making this advisable investment is legally proper.

If appellant had sub-leased or assigned its lease to Teck-Toys as appellant's President testified he considered doing when he acquired the lease, the law seems clear appellant would not have been doing business in Arizona.

See:

Linton v. Erie Ozark Min. Co. (Ark.), 227 S. W. 411;

Wilson v. Peace (Tex.), 85 S. W. 31;

Missouri Coal & Min. Co. v. Ladd (Mo.), 61 S. W. 191.

The proposition may be stated in another way. A lease when made is valid. The doing business under the lease is invalid. The lessee has a change of heart, a *locus*

poenitentiae and regrets the unlicensed doing of business. Does that forfeit his lease? Or, has he a right to stop doing business and assign his lease where the lease provisions give him that right?

Suppose in New York State I run my automobile on February 2nd, 1954 on the 1953 license which expired February 1st. I realize a policeman may serve me with a summons for a penal offense, *malum prohibita*, not *malum in se*.

Does that mean the policeman can steal my car because I drove it unlicensed one hour? Does it also mean that I have no right to correct my inadvertent error? May I not procure a 1954 license for the car and drive it on February 3rd, and thereafter?

Here there is an act of inadvertence and not moral turpitude. (They thought when they paid a sales tax to the State of Arizona they were permitted to do business. They had no legal advice.) They failed to file a license and did business.

They discovered it in 1951 and gave up doing business. In other words, they no longer drove the car.

Does that mean Tucson Airport Authority could appropriate the car on the ground that its use having been illegal theretofore, it was void *ab initio* and continuously thereafter?

Is the lower Court right when it holds that the lease was void at its inception because when signed the lessee was not licensed? Was the signing an act of doing business which rendered the lease void forever?

That would lead to so many forfeitures that there would be no place of repentance for the honest, mistaken citizen. He would be pilloried the rest of his life for an innocent error, no matter what attempts he made to correct and do penance therefor.

Another illustration: Appellant took a valid lease. His occupancy during two and a half years of the 12 year term was in the eyes of the law void, unenforceable and illegal. In other words, the void use of the premises may be treated as though appellant did not use the premises at all.

Is the appellant still not entitled to the benefit of his bargain on a substantial property right involving the onwership of real estate, namely, the last nine and a half years of demised term, especially in view of the appellant's foresight in obtaining a lease provision that it had the right to assign or sublet, and that the landlord must accept a financially satisfactory tenant.

Grand Central Aircraft was most satisfactory to the landlord financially because landlord accepted it as a tenant paying \$1,400 a month for appellant's demised space, only respondent kept to itself the \$1,300 a month difference instead of giving it to appellant entitled to it by reason of its property rights under the lease.

The question would be less doubtful of determination if respondent in attempting to oust appellant had assigned as its reason the fact that appellant was doing business without license. Even then there is grave doubt whether had the ouster been on that claim appellant would not still have retained its vested property right in the nine year and seven months' balance of the term of the lease.

But that's not the instant question. Here respondent never ousted appellant for the void business conduct. Instead it relied upon a fraudulent mis-representation as a result of which it obtained appellant's removal. Only much later did appellant discover the fraud of respondent and that the Government had not taken the property.

Upon the familiar principle that if one rejects the delivery of goods upon an assigned reason namely shortage, one cannot thereafter defend upon the ground that the

goods were imperfect merchandise anyhow. One stands or falls upon the claim assigned.

In the instant case respondent must fall because the misrepresentation was in writing and the fraud was ample proof through respondent's own admissions.

That the respondent gained an unholy profit to the extent of \$145,000 for the balance of the term by reason of its written fraudulent misrepresentation does not give any greater rights than the ground upon which it stood and which it assigned as its reason for cancelling the lease.

Now that the ground has fallen away from under respondent, it is too late to urge another ground which in any event we have shown above applies only to the term when the premises were illegally used and does not forfeit the balance of the term of nine years and seven months for which appellant had the forethought to provide that he was entitled to assign to any financially satisfactory tenant and reap the benefit on that assignment of his bargain.

The lower court erred because it failed to separate and distinguish between two property rights of appellant. One was the property right appellant possessed to do business. In that property right as an incidental to doing business he occupied leased premises. That property right appellant lost because it failed to file as a foreign corporation within the statute, and all its rights of doing business were rendered unenforceable by the penal statute of Arizona.

The appellant had another vested property right which the lower court entirely overlooked. That vested property right, a lease with nine and a half years to go, with a right of assignment whereby landlord was compelled to take any tenant of satisfactory financial means, was not affected by the loss of appellant's other property right. That lease was valid from its inception. When appellant ceased manufacturing, it could not restore its right to enforcement of contracts or rights arising out of its doing

business in the State of Arizona, but the lease, the vested property right of twelve years' demised possession, with the right of assignment to which landlord could not object, continued in full force and effect. If anything it continued more strongly in full force and effect when appellant ceased doing business in the State. That right, the ownership of real estate, was not forfeited.

The rights under the lease belonged to the appellant. Respondent could not deprive appellant of the \$1,300 a month difference in rental value on the ground that for two and a half years under a twelve year lease appellant had illegally done business. That is surely true when no such claim is made as the reason for the ouster. Respondent defrauded appellant into giving up of nine and a half years of a twelve year term by making appellant believe that the government had taken over the property under its recapture clause. Instead, respondent was merely arrogating to itself \$1,300 difference in rental value, knowing all the time that Grand Central would pay \$1,300 a month more for appellant's space and profiting by its own fraud, to the extent of one hundred forty odd thousand dollars over the nine and a half year term.

When the two separate property rights are considered in that light, it would seem clear that though appellant forfeited the right to enforcement of its business contracts by doing business without a license in Arizona for two and a half years, it did not forfeit its twelve year lease incidentally used in doing such business. If there was any such intent in the penal statute of Arizona it would certainly be more clearly expressed.

That vested property right under the Constitution could not be taken away from appellant without due process even if appellant were an alien, instead of a citizen of another State who had inadvertently failed to file to do business. Though the Court would not lift a finger to help

appellant to enforce any business contract while doing business in Arizona, the Court should be just as astute to protect appellant in his vested property right to the lease taken as an investment, used for two and a half years without license (during which respondent, of course, promptly received rent as due) and still a vested nine and a half year unexpired term of property appellant had the right to assign or sublet. That respondent should sublet it at \$1,300 a month more for the unexpired period of appellant's term and deprive appellant of its profit by foisting a fraudulent scheme upon appellant only makes the argument in appellant's favor more unanswerable.

To interpret the Arizona statute as done by the Trial Court would make the law unconstitutional since it would take from the appellant foreign corporation, as a nonresident citizen, its property without due process of law and deny it the same rights, immunities and privileges that are accorded to citizens of Arizona, and finally would deny such foreign corporation the equal protection of the law.

“In applying these constitutional and statutory provisions regulating the doing of business in the state by foreign corporations it is important to keep in view the fact that they are prohibitory in character and should not be extended by interpretation beyond their plain terms.”

Fletcher Cyclopedia Corporations Permanent ed.
Vol. 17; Sec. 8464 p. 468.

The defendant-respondent was put on notice that the appellant-lessee was buying the lease only as an investment and not necessarily to operate. Paragraph “8th” of the lease says: “It is understood and agreed that the lessee plans on assigning a portion or all of this lease to one or more other corporations.”

And, of course, further: “Lessor agrees to approve any such assignment or subletting providing that the said sub-

lessee or tenant is reasonably satisfactory to said lessor.” (Par. 8).

So, if the premises were taken with that understanding, let us assume that the first three years of the lease the premises were vacant and landlord still received the rent from the tenant. The void occupancy (illegality in failing to file in the State) may be considered the same as a vacancy.

Could the landlord, if the premises were vacant for the first three years, still having received his monthly rental, successfully say that the tenant had lost the right to the other 9 years of the lease in view of the recitals in Paragraph 8th and the binding stipulation that the landlord had to accept a satisfactory assignee or sub-lessee?

The landlord did accept what it knew was a satisfactory assignee or sublessee of the premises in Grand Central Aircraft Corporation but it took for itself the \$1,300 a month difference between the amount stipulated with appellant and the amount Grand Central was paying and still pays, that the difference belongs to appellant, not respondent, by forfeiture.

Here is another example: (I hope I am not worrying the Court with my parallel suits, but I know of no other way to establish my argument completely.)

Suppose I bought a piece of real estate in Arizona and erected a factory on it. I operated three years without a license and then belatedly procured a foreign corporation right to do business permit. Could the State of Arizona, to whom I paid all my taxes on the real estate (appellant paid all the rent on his real property, a lease for more than three years, namely 12 years) successfully claim that I had forfeited my real property? Could any trespasser walk in and take it away because I had operated without a license?

The statute prescribes the penalty. All acts done are void and unenforceable, but the acquisition of the real property was legal when made. Is there anything in the statute that says it became forfeit?

And if there is, is there no *locus poenitentiae* (May not a wrong-doer, not *malum in se* but *malum prohibitum* have a change of heart and comply with the statute, whether his previous failure was purposeful or inadvertent?)

No reading of the statute can render a real property right valid when acquired, void and forfeit by reason of unlicensed acts of aliens or foreign corporations.

The situation may be even more clarified by supposing that I erected a liquor store on real property in Arizona and ran it without a license. Could I, thereafter, demolish the store and still own the vacant land? Is there anything in the statute that says that the land became forfeit because the use of the land was without permission? It would require reading into a penal statute, which must be strictly construed, penalties never intended by the codifiers.

POINT IV

Appellant demanded a trial by jury. The Trial Court undertook to determine a disputed question of fact by directing the jury to find for the defendant.

It has long been settled law that under general principles of comity, and in the absence of positive direction to the contrary, corporations created in one state are permitted to acquire, hold and convey property in another state equally as may individuals.

Cowell v. Colorado Springs Co., 100 U. S. 55; 25 L. ed. 547;

Christian Union v. Yount, 11 Ott. 352; 25 L. ed. 888; 101 U. S. 352.

A person seeking to avoid a transaction with a foreign corporation on the ground of non-compliance has the burden of showing a general course of dealing.

Monaghan & Murphey Bank v. Davis, 27 Ariz. 532, 234 P. 818.

“If the facts relating to the doing of business are undisputed and the inference to be drawn from them is so obvious as to leave no issue for the jury, the question is one of law for the court; but where the evidence upon the point is conflicting so that reasonable minds might draw different conclusions therefrom, it is for the jury under proper instructions from the Court.”

Fletcher, *Cyclopedia, Corporations*, Permanent Edition, Vol. 17, Sec. 8502, note 54 and cases cited.

The case of *Lake Superior Piling Co. v. Stevens* (La.), 25 So. (2nd) 120 is in point on this angle of the case. In that decision the court held that the question of whether a foreign corporation's ownership of property in that state was “doing business” could not be answered without a finding of the facts, which the trial court failed to make, and hence the case was reversed for that reason. See also:

Davis-Wood Lumber v. Ladner (Miss.), 50 So. (2nd) 615.

In our case the trial court apparently considered that this was not a question of fact, that the burden was upon the plaintiff to prove compliance with the state law, or that the fact situation was undisputed. The mere consideration of these alternatives makes the error more glaring.

If every other contention made by Appellant in this brief were wrong, still the case must be reversed for this

fundamental error under which the court usurped the province of the jury and undertook to try and decide this fundamental fact situation. That error was and is fatal to the validity of the judgment appealed from.

Respectfully submitted,

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Attorneys for Appellant.

In the
United States Court of Appeals
For the Ninth Circuit

WORCESTER FELT PAD CORPO-
RATION,

Appellant,

vs.

TUCSON AIRPORT AUTHORITY,

Appellee.

Appellee's Answering Brief

FILED

JAN 29 1955

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In the
United States Court of Appeals
For the Ninth Circuit

WORCESTER FELT PAD CORPO- RATION,	}	No. 14462
vs.		
TUCSON AIRPORT AUTHORITY,	}	
<i>Appellant,</i>		
<i>Appellee.</i>		

Appellee's Answering Brief

FOREWORD

Examination of the Brief for Appellant discloses a failure by Appellant to comply with the rules of this Court.

Rule 18-2(b) of the Rules of Practice of this Court requires a statement of the pleadings and facts disclosing the basis for the District Court jurisdiction and for the jurisdiction of this Court. Such statement must refer distinctly to the statutory provisions believed to sustain the jurisdiction. Appellant has failed to state any statutory provisions sustaining the claimed jurisdiction of either the District Court or of this Court.

Rule 18-2(d) requires that in all cases a specification of errors relied upon by Appellant shall set out separately and particularly each error to be urged. Under the heading "SPECIFICATION OF POINTS AND ERRORS OF THIS APPEAL" appearing at Page 4 of the Brief for Appellant there are no claimed errors of the District Court set forth by Appellant.

STATEMENT OF THE CASE

Throughout Appellant's statement of the case under the heading "The Action" at Pages 2 and 3 of the Brief for Appellant, it refers to false representations and fraud. Such statements are mere conclusions of counsel which are not justified by the record in the case. There was no proof of false representations or of fraud on the part of Appellee.

Appellant states at Page 1 of the Brief for Appellant that its appeal is from the judgment of the District Court of December 9, 1953, and from the order denying plaintiff's motion for a new trial. Appellant's notice of appeal does not include an appeal from the denial by the District Court of Appellant's motion for a new trial. (T. 32).

Appellant omitted from its statement many facts concerning Appellant's business organization which Appellee feels should be stated for the benefit of this Court.

Appellant is a Massachusetts corporation engaged in the manufacture of household items used in kitchens

and laundries. It operated from a plant in or near Worcester, Massachusetts, in which it had carried on its manufacturing business for nearly 25 years. (T. 156, 157). The president and treasurer of Appellant was Mr. Julius Brauer.

Some three years prior to January 15, 1952, Appellant had determined to come to Tucson, Arizona, for the purpose of opening a plant to serve its western customers. (T. 208).

Appellant commenced negotiations for a lease with Appellee in January or February, 1949. (T. 220).

On March 1, 1949, Appellant and Appellee entered into the lease in question and Appellant took possession of the premises covered by the lease right after the lease was signed. (T. 158).

In March, 1949, Mr. Robert Alpert was sent from Chicago, Illinois, to Tucson, Arizona, by Appellant. From the time of his arrival in Tucson until he left Tucson in December, 1951, he was employed as manager of the Tucson operation of the Appellant. (T. 178, 200).

A bank account was opened by Appellant in the Valley National Bank of Phoenix in Tucson, Arizona, on March 14, 1949. This account remained open and active until it was closed February 19, 1952. (Defendant's Exhibits E and F, T. 247, 248).

Some time in the latter part of March, 1949, Appellant started receiving machinery in Tucson to be used

by it in its Tucson manufacturing operations. At about the same time Appellant commenced employing persons to assist in the installation of such machinery. (T. 206, 207). After the machinery was installed Appellant commenced manufacturing and selling the same type products which it had manufactured at its principal plant in Worcester, Massachusetts. It continued such operations until December, 1951. (T. 159, 160).

On September 26, 1951, Lt. Col. James L. Pattilo, Air Force Officer in Charge, Air Force Plant Office, Grand Central Aircraft Company, Glendale Division, Western Procurement District, addressed a letter to Appellee in which he requested that all undercover space on Tucson Municipal Airport occupied by the Air Force and Consolidated Vultee during World War II be made available immediately for rental or lease by Grand Central Aircraft Company. (Plaintiff's Exhibit 5, T. 76-78).

On October 4, 1951, the manager of Appellee responded to Lt. Col. Pattillo's request stating that he would present the request of the Air Force to Appellee's Board of Directors. (Plaintiff's Exhibit 8, T. 87-90). On October 10, 1951, Lt. Col. Pattillo acknowledged receipt of Mr. Schmidt's letter of October 4, 1951, and requested Mr. Schmidt to advise him of the Appellee's Board of Directors' decision. (Plaintiff's Exhibit 9, T. 94). On October 6, 1951, Mr. Schmidt transmitted a copy of plaintiff's Exhibit 5 to Mr. H. A. Hook, Civil Aeronautics Administration, asking for the C.A.A.'s opinion as to the effect of the request

of the Air Force. (Defendant's Exhibit H, T. 259, 260). On October 9, 1951, Mr. H. Brown of the Civil Aeronautics Administration advised Mr. Schmidt that the request of the Air Force was within the authority reserved to the Government in the agreement by which the United States Government deeded the airport property to the City of Tucson. (Defendant's Exhibit G, T. 257-259).

After receiving the letter from Mr. Brown of October 9, 1951, on October 18, 1951, Mr. Schmidt addressed a letter to Mr. Brauer, as president of Appellant, advising him the Federal Government required the use of space at the airport which was then occupied by Appellant and notifying Appellant of the termination of the lease, and notifying Appellant to vacate the premises occupied by it by November 30, 1951. (Plaintiff's Exhibit 2, T. 80-82).

Thereafter Appellant asked for and was granted by Appellee an additional period of time to remove its property from space occupied by it at the Tucson Municipal Airport. On or about December 15 or 16, 1951, Appellant voluntarily vacated the premises previously occupied by it at Tucson Municipal Airport. (T. 159).

Appellant at no time complied with the statutory provisions of the State of Arizona required of a foreign corporation before it may enter upon, do or transact any business within the State of Arizona. (Defendant's Exhibit D, T. 192, 193).

Appellant, on page 4 of its brief, concludes its statement of the case in these words:

“The question presented on this appeal:

Is a suit on a lease, valid when made, rendered void by the subsequent doing of business by the lessee?”

This precise question is not raised by the record. There are more than one question to be considered in this appeal. Every question raised by Appellee's motion for a directed verdict is to be considered upon this appeal.

Appellee submits that the questions presented by this appeal are:

(1) Can a Massachusetts corporation enter into a valid lease in Arizona prior to the time it qualifies as a foreign corporation under the statutes of the State of Arizona, when the undisputed evidence is that for some time prior to the execution of the lease it had planned to enter upon its business in Arizona, had negotiated for the leasing of premises in Arizona for the conduct of a portion of its regular business in Arizona, and when immediately following the execution of a lease it actually commences to manufacture and sell in and from the leased premises in Arizona the same type of products it had been manufacturing and selling in and from its principal place of business in Massachusetts? and

(2) Was there any evidence in support of the material allegations of its complaint which entitled Appellant to go to the jury upon any of the issues raised

by its complaint, Appellee's answer as amended, and the evidence?

Appellee's answer to each of these question is *No*.

ARGUMENT

1. **Can a Massachusetts Corporation Enter Into a Valid Lease in Arizona Prior to the Time it Qualifies as a Foreign Corporation Under the Statutes of the State of Arizona, When the Undisputed Evidence is that for Some Time Prior to the Execution of the Lease it Had Planned to Enter Upon Its Business in Arizona, Had Negotiated for the Leasing of Premises in Arizona for the Conduct of a Portion of Its Regular Business in Arizona, and When Immediately Following the Execution of a Lease it Actually Commences to Manufacture and Sell In and From the Leased Premises in Arizona the Same Type of Products it Had Been Manufacturing and Selling In and From Its Principal Place of Business in Massachusetts?**

Each State possesses broad power to control the activities of foreign corporations within its borders. A State may, in granting to a foreign corporation the privilege to do business within its borders, impose such conditions, restrictions, and regulations as it may see fit, and the mere fact that they are unreasonable or discriminatory does not destroy their validity. See: 23 Am. Jur. 207, Sec. 238, Foreign Corporations, American Law Institute, Restatement, Conflict of Laws,

Sec. 169, and *Crescent Cotton Oil Co. vs. Mississippi*, 257 U. S. 129, 66 L. Ed. 166, 42 S. Ct. 42.

Arizona has exercised this power granted to it and the statutory pronouncements of it are found in Secs. 53-801 A.C.A. 1939 Ed., 1952 Cum. Supp., and 53-801 A.C.A. 1939 Ed., both of which are quoted in full in the Brief for Appellant at page 5 thereof. Appellee will not requote the statutes in its brief.

In an action brought by a foreign corporation which has not qualified to do business within the State in which the Federal Court sits, the Federal Court is governed by the provisions of the State statutes as construed by the Courts of the State. See: *Metropolitan Life Ins. Co. vs. Kane*, 117 Fed. (2d) 398, and *Erie R. Co. vs. Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

If the lease upon which Appellant is suing was made in violation of the laws of the State of Arizona, it can not be enforced in any court sitting in this State charged with the interpretation and enforcement of its laws. See: *Cooper Manufacturing Co. vs. Ferguson*, 113 U. S. 1137.

The Arizona Statute prescribing the conditions upon which a foreign corporation may be licensed to do business within the State of Arizona requires any foreign corporation, before *entering upon*, doing, or transacting any business, *enterprise* or occupation in this State, to do certain enumerated things. Research by counsel for Appellee indicates that no other State

has included in its statute governing foreign corporations the words "entering upon."

We assume that it is beyond argument that appellant as of the date of the execution of the lease involved in this appeal had not complied with the provisions of Sec. 53-801 A.C.A., 1939 Ed., 1952 Cum. Supp. Likewise it must be conceded that appellant did not comply with the provisions of that statute at any time subsequent to the execution of the lease.

By implication the Arizona Supreme Court in *Woodward vs. Fox West Coast Theaters*, 36 Ariz. 251, 284 P. 350, stated that a lease executed by a foreign corporation which had not qualified itself to do business within the State prior to the execution of the lease would be void and unenforceable.

In that case the Arizona Supreme Court had before it a case in which the Fox West Coast Theaters, a foreign corporation, had leased property in Phoenix, Arizona. Fox West Coast Theaters was a California corporation, and during the negotiations for the lease it had not qualified to do business in Arizona. Prior to the execution of the lease, however, it had complied with the statutory provisions of the State and had been licensed to do business within the State. The Supreme Court of Arizona said:

"We do not think that, because plaintiff was not qualified and licensed during the negotiations leading up to the lease, it would affect the validity of the lease. *It was qualified when the lease was*

executed. That appears to be sufficient." (Emphasis supplied.)

The inference to be deduced from its decision is that the Arizona Supreme Court determined the lease to be valid and enforceable because of compliance by Fox West Coast Theaters with the requirements of the Arizona statutes *prior to the actual execution of the lease*. The inference cannot be escaped that had such a compliance not been shown the lease would have been held void and unenforceable.

In the case of *National Union Indemnity Company vs. Bruce Bros., Inc.*, 44 Ariz. 454, 38 Pac. (2d) 648, plaintiff, Bruce Bros., Inc., was a Nevada corporation which had entered into a contract with the State of Arizona for the construction of a highway. Plaintiff and defendant, Scott, entered into a subcontract by which Scott was to furnish gravel to plaintiff for use in the construction of the highway. Scott furnished plaintiff with a performance bond upon which defendant, National Union Indemnity Company, was surety. Scott defaulted in the performance of his contract with Bruce Bros., Inc. Bruce Bros., Inc., took over, finished the job and then sued Scott and his surety for damages. The Arizona Supreme Court held, that because of its failure to qualify to do business within the State of Arizona, Bruce Bros., Inc., could not recover on its contract with Scott or on Scott's bond.

The Arizona court pointed out that the principal business of Bruce Bros., Inc., was the constructing of

highways wherever it could obtain a contract to do so. It had obtained a contract of considerable magnitude for the construction of a highway within the State of Arizona. It had moved a large amount of equipment into the State, maintained an office for the transaction of its business in the State, and its operations, in connection with the performance of its contract, involved dozens of separate transactions and many thousands of dollars, all of which were done through its office in Arizona.

The Court said:

“If this be not the transaction of business within the State, we are unable to see where anything done by that kind of a corporation would be such. . . . We hold, therefore, that plaintiff was, within the meaning of Section 658, *Supra*, transacting business within the requirements of Section 657, *Supra*. If nothing further appears, plaintiff may not maintain this action, for by the express language of the Statute, its contract is void.”

The Supreme Court of Arizona also pointed out that under a statute like Arizona's there is no room for construction in that the Arizona legislature has repeatedly and solemnly declared that *any and all the acts* of a foreign corporation which has not qualified to do business in Arizona, are void without qualification or exception of any nature. The Court said in this regard:

“Under such circumstances, no action that anyone could take could give the contract validity.”

Applying the Bruce Bros., Inc., case to the factual situation in the present case we find quite an analogous situation. Appellant is a Massachusetts corporation which was engaged in the business of manufacturing, selling and distributing household items such as ironing board covers, ironing board pads, laundry bags and other items that are used in the kitchen or laundry of a home, and which, prior to March 1, 1949, was conducting all of its operations from its home plant at Worcester, Massachusetts.

Prior to March 1, 1949, it was selling and distributing its manufactured products throughout the western part of the United States. Prior to January 15, 1949, it determined to open a plant in Tucson, Arizona, and along in January or February of 1949, its president commenced negotiating for a lease on certain property controlled by Tucson Airport Authority. On March 1, 1949, it entered into a lease with Appellee, and within a short time it had opened a bank account in Tucson, was installing equipment, procuring personnel, and manufacturing the same type of products in its rented facilities in Tucson, as it had been manufacturing in Massachusetts. Thereafter, at Tucson, it continued to perform the same type of manufacturing, selling and distributing of the same type of items as were manufactured, sold and distributed from its Massachusetts plant. It doing so it had employees here, was purchasing and receiving materials here, was banking here, and was shipping its finished products from its Tucson plant to customers in Arizona and throughout the western part of the United States.

The conclusion is inescapable that the actions of the Appellant at its plant in Tucson were the same type as those described by the Arizona Supreme Court in the *Bruce Bros., Inc.* case, *supra*, and in the words of the Supreme Court as published in that case "if this be not the transaction of business within the State, we are unable to see where anything done by this kind of a foreign corporation would be such."

Appellant's theory would seem to be that since the Arizona Supreme Court has on some occasions indicated that a "single, isolated act" would not constitute a doing of business so as to require a foreign corporation to comply with the statutes of the State, its act of entering into a lease on March 1, 1949, was a "single, isolated act" which did not constitute doing business within the State, and that therefore the statutory pronouncement that such act is "Void" does not apply. It may be said that if Appellant did nothing further after entering into the lease, a different question would be presented. However, an examination of the cases cited by Appellant in its Opening Brief indicates that while the Supreme Court of Arizona did start out by referring to "single, isolated acts" as not constituting the "doing of business" in Arizona, as time progressed and as modification of the Act included the words "entering upon", it started to consider in its decisions the doing of an act with the intention of entering upon or engaging in an enterprise of some permanence and durability, as opposed to a single act.

In this case the record is crystal clear that the execution of the lease by Appellant with Appellee was the entering upon an enterprise in the State with the idea of operating a business of considerable permanence and durability. It might have been the first act done by the Appellant within the State of Arizona, but certainly it does not fall into the category of a "single, isolated act."

All prior Arizona cases involving a construction and application of the statutory provisions involved in this case were reviewed by the Arizona Supreme Court in the case of *National Union Indemnity Company vs. Bruce Bros., Inc., Supra*. In summing up, the Court said,

"It will be seen from these cases that we have held an isolated act of business done or contract entered into in Arizona does not bring the foreign corporation within the statute, and that to come within it 'a corporation must be engaged in an enterprise of some permanence and durability, and must transact within the State some substantial part of its ordinary business, and not merely a single act.' "

In these prior Arizona cases the isolation of the acts or contracts under consideration was apparent, showing no intention of permanence and durability in doing business in Arizona. The actors in most of these cases didn't have places of business, they were not trying to establish places of business, they didn't pursue or prosecute any business in Arizona.

In the *Bruce Bros.* case, however, the plaintiff established an office for the transaction of business, brought road equipment into the State and pursued its business in the State. Bruce Bros., Inc., couldn't recover. Its very first act showed that it intended to do business in the State. A single act is not always an isolated act. When it is accompanied by an intention to do business in the State and followed by the doing of business in the State, the foreign corporation must be legally qualified and licensed. The contract Bruce Bros., Inc. made with Scott was not an isolated act. It was accompanied by an intention to do business in Arizona. Bruce Bros., therefore, could not recover on the contract because, not being qualified or licensed, the contract was void.

This case, as has been shown above, is on all fours with the case of Bruce Bros., Inc. It is not contended that a foreign corporation intending to do business in Arizona may not survey the situation, gather information, look for a place of business, enter into negotiations for a lease, as Fox Coast Theaters did, but when it decides to do business in the State, then any act following these preliminary negotiations, such as securing a place for the transaction of its business, is absolutely void if, prior to the commission of the act, it had not qualified itself to do business. The Fox West Coast Theatres lease was held to be valid because following negotiations and before executing the lease, it did qualify itself to do business in Arizona. When a foreign corporation makes up its mind to do business

in Arizona it must qualify itself before it begins to transact any business.

An act "accompanied by an intention to perform a series of further acts in the State in the prosecution of its business constitutes the doing or carrying on of business in the State, although no other act or transaction has yet been done or entered into." (Am. Jur., Vol. 23, p. 355).

There is no doubt about the provisions of Sec. 53-802 A.C.A. 1939 Ed. It solemnly declares that "*every act*" done by a foreign corporation prior to complying with Sec. 53-801 A.C.A., 1939 Ed., 1952 Cum. Supp. "*shall be void.*" It does not say that the first act done shall be valid and that all subsequent acts shall be void, as Appellant would lead the Court to believe. The statute is clear and unequivocal, it has been interpreted by the Arizona Supreme Court, and the only conclusion that can be drawn from the Statutes and from the decisions of the Court is that the lease made by Appellant with Appellee on March 1, 1949, as held by the Trial Court, is void and unenforceable.

2. Was There Any Evidence in Support of the Material Allegations of Its Complaint Which Entitled Appellant to Go to the Jury Upon Any of the Issues Raised by Its Complaint, Appellee's Answer as Amended, and the Evidence?

At the conclusion of all of the evidence upon the trial of this case, both parties having rested, Appellee moved for an instructed verdict in its favor. The mo-

tion appears at pages 261, 262 of the Transcript of Record. The motion was based upon the following:

(1) That Appellant had not proven fraud on the part of Appellee;

(2) That Appellant had not proved that it had been wrongfully evicted from its leased premises by Appellee; and

(3) That Appellant was a foreign corporation which had not qualified to do business in Arizona as of the date of the execution of the lease involved in the case.

Appellee has previously discussed the third part of its motion for an instructed verdict, and as indicated believes the Trial Court was correct in granting the motion upon that ground. The other two grounds for an instructed verdict which were specifically presented to the Court were not mentioned by the Court in directing the verdict but they are good and sufficient grounds in support of the Court's order and Appellee therefore is entitled to urge them before this Court in further support of the order.

“ . . . grounds of a motion for a directed verdict which were presented to the trial court may properly be urged in an appellate court in support of a propriety of such direction even though the lower court did not pass upon them.”

Mosby vs. Manhattan Oil Co., 52 Fed. 2d 364,
77 A.L.R. 1099.

The gist of Appellant's complaint (T. 9-13) was:

(1) That Appellee falsely represented to Appellant that the Federal Government required Appellant's leased premises; and

(2) That Appellee wrongfully evicted Appellant from its leased premises.

Actions based on fraud have had their fair share of attention by the Arizona Supreme Court and its decisions have clearly defined the law applicable thereto in the State of Arizona. These decisions are, of course, controlling upon the question in this case.

“Fraud is generally classified under two major headings, actual and constructive. The former is distinguished by the presence of an actual intent to deceive, while the latter is characterized by a breach of duty actionable at law irrespective of moral guilt, and arising out of a fiduciary or confidential relationship.”

In re McDonnell's Estate, 65 Ariz. 248, 179 P. 2d 238.

There is no fiduciary or confidential relationship existing between lessor and lessee. See: *Meachem vs. Halley*, 103 Fed. 2d 967.

The elements of actionable fraud have been defined by the Arizona Supreme Court in *Rice vs. Tissaw*, 57 Ariz. 230, 112 P. 2d 866, as follows:

- “1. A representation;
2. Its falsity;

3. Its materiality ;
4. The speaker's knowledge of its falsity or ignorance of its truth ;
5. His intent that it should be acted upon by the person and in the manner reasonably contemplated ;
6. The hearer's ignorance of its falsity ;
7. His reliance on its truth ;
8. His right to rely thereon ;
9. His consequent and proximate injury."

The evidence in this case was that Appellee represented to Appellant that the Federal Government required the use of the space occupied by Appellant. It was never shown that such a representation was false. In fact, the only evidence in the case on the point was that the request as made by Col. Pattillo was referred by Appellee's general manager to the C.A.A. for determination as to its validity, and that the C.A.A. advised Appellee that the request was a proper one under the reservations of the Government in the deed conveying the airport property to the City of Tucson.

There was no evidence that Appellee had knowledge of the falsity of any representations made by it, or that it made any representations in ignorance of their truth. The contrary was shown to be the fact—Appellee believed to be true any representation made by it, was advised by C.A.A. that it was true, and passed it on to Appellant as being true.

There was nothing in the record to show that Appellant had the right to rely upon any representations

made by Appellee's manager. The record is clear that Appellant accepted whatever representations were made to it by Appellee and at no time made any attempt to inquire of the Government or any of its representatives as to the truth or falsity of the matters stated in Appellee's letter to Appellant.

"Where parties deal at arm's length and are on equal terms, one who has failed to avail himself of knowledge readily within his reach can not claim the right to rely upon representations which he could have discovered to be false by the use of such knowledge."

Law vs. Sidney, 47 Ariz. 1, 53 P. 2d 64.

In summary, the Appellant did not prove: that any representation made by Appellee was false; that Appellee knew that any representations of any type made by it were false; or that Appellant had the right to rely upon any representations made by Appellee. For this reason, Appellant failed to prove the material allegations of its complaint, and the directed verdict is supported by the first ground presented by Appellee's motion therefor.

There can be no question but that Appellant voluntarily surrendered possession of the premises occupied by it to Appellee along in December 1951. There was no forcible eviction of Appellant from its premises by Appellee, and likewise there was no evidence of any harrassing actions or threats of violence made against Appellant by Appellee.

When a tenant voluntarily surrenders possession of the leased premises it can not thereafter contend that it has been wrongfully evicted.

In *Coury v. Porterfield*, 299 S.W. 938, a lease provided for termination of the lease if oil should be found in the county and the landlord gave notice of termination stating that oil had been found. This was untrue, but the tenant moved out anyway. The Court held that there had been no wrongful eviction for the reason that the demand of the lessor did not deprive the tenant of the beneficial enjoyment of the leased premises.

In *Gibson v. Thisius*, 134 P. 2d 713, the Court said:

“It has been broadly stated in some cases that mere notice to quit, followed by vacation of the premises by the tenant, is sufficient to constitute a constructive eviction, or, at least to make an issue of fact for the jury. We think, however, it will be found in all such cases harrassing incidents disturbing to the tenant’s peaceful possession occurred on the property. . . . To constitute constructive eviction there must be some substantial interference which is injurious to the tenant’s beneficial use and enjoyment of the premises.”

While the Appellant alleges a wrongful termination of its lease, it failed to prove a wrongful eviction. The vacating of the premises by Appellant was a purely voluntary act on its part and as such does not support a claim for wrongful termination of its lease or for wrongful eviction. There was no substantial interference with Appellant’s beneficial use and enjoyment of

the premises. For this reason, the second ground urged by Appellee in its motion for an instructed verdict was well taken, and supports the ruling of the Court on that motion.

CONCLUSION

The Court's order granting Appellee's motion for directed verdict may be sustained on any one of the following three grounds:

(1) That Appellant at no time prior to or subsequent to the execution of its lease with Appellee on March 1, 1949 complied with the statutes of the State of Arizona governing the entry upon or doing of a new enterprise of business by a foreign corporation.

(2) The Appellant completely failed to present any competent evidence from which reasonable persons could find that the Appellee at any time made a material false representation, knowing of its falsity, with the intention that the Appellant rely upon it, and which representation Appellant did rely upon, having the right to rely thereon and thereby suffered damage.

(3) Appellant failed to present any competent evidence from which reasonable persons could find that Appellee had wrongfully terminated Appellant's lease and wrongfully evicted Appellant from its leased premises.

Because of all of the foregoing matters, the ruling of the Trial Court should be affirmed.

Respectfully submitted,

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In the
United States Court of Appeals
For the Ninth Circuit

WORCESTER FELT PAD CORPO-
RATION,

Appellant,

vs.

TUCSON AIRPORT AUTHORITY,
Appellee.

Petition for Rehearing

BOYLE, BILBY, THOMPSON &
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MAR 21 1956

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In the
United States Court of Appeals
For the Ninth Circuit

WORCESTER FELT PAD CORPORATION,

Appellant,

vs.

TUCSON AIRPORT AUTHORITY,

Appellee.

No. 14462

Petition for Rehearing

Comes now the appellee, Tucson Airport Authority, and respectfully petitions the Court to grant it a rehearing in the above captioned and numbered cause, upon the following grounds:

1. The Court in its majority opinion erroneously applied the "single and isolated" rule to the facts of this case, notwithstanding the fact that the undisputed evidence clearly indicated the commencement and continuance for more than two years of a course of business, during all of which time the appellant Worcester Felt Pad Corporation failed to comply with the provisions of Sec. 53-801 A.C.A. 1939 Ed., 1952 Cum. Supp.

2. The Court in its majority opinion has disregarded the clear, unambiguous and repeated pronouncements of the legislature of the State of Arizona that:

“Every act done by said corporation prior thereto (complying with 53-801) shall be void”,

and by its opinion construes the statute to mean that instead of every act, the legislature meant that the first or second, or, in the words of the majority opinion, the preliminary acts, are not to be considered void.

3. The majority opinion also states, at page 8, the following:

“He (Schmidt) admitted he had received a \$2,000 salary increase ‘out of this’.”

This statement is incorrect and is not found expressly or by inference in the record of this case and should not be permitted to remain in the opinion of the Court.

I.

Each of the Arizona cases cited by the majority of the Court in support of its conclusion involved a fact situation where a foreign corporation performed one act—and only one act—within the State of Arizona. Some of the Arizona cases cited in the majority opinion in fact involve transactions that were consummated completely outside the State of Arizona. In these cases, the only thing done in Arizona involved litigation.

In contrast to the cases upon which the majority of the Court has relied, the present case involved a fact situation in which a Massachusetts corporation, through its officers, came to Arizona in January of 1949, and entered into negotiations looking toward the lease of property in Arizona. This could well be, and should be, considered as act number one by the Massachusetts corporation in Arizona. These negotiations culminated in act number two—the execution within the State of Arizona on March 1, 1949 of a lease of certain premises for a period of three years, with options to extend the lease further. This lease had a right of appellant to sublet. The appellant's evidence considered most favorably toward it was that it either intended to operate the premises in furtherance of its own business, or to sublet the premises, whichever would be most profitable. There can be no doubt that in entering upon the negotiations and in executing the lease, the appellant was doing so for the purpose of attempting to make a profit out of the leased premises. It was never suggested by anyone that the appellant did not intend to exercise control over the premises described in the lease or to assert the ownership of whatever rights might accrue to it by virtue of that lease.

It is true that there has not as of this date been a ruling by the Supreme Court of Arizona upon the precise question presented by this appeal, insofar as it relates to foreign corporations. However, the Arizona Supreme Court, in *Woodward vs. Fox West Coast*

Theaters, 36 Ariz. 251, 284 Pac. 350, by implication indicated that if a foreign corporation was not qualified to do business in Arizona at the time it executed a lease agreement on Arizona property, such lease would be void as prescribed by 53-801 A.C.A. 1939 Ed. The Supreme Court in this case stated that since the theater company had qualified *prior* to actual execution of the lease, the lease was valid. The only fair and reasonable deduction to be drawn from the language in that case is that had the theater company not been qualified as of the date of the execution of the lease, the lease would have been void, all in accordance with the express language of the statute.

This Court in its majority opinion has stated that it does not feel that the case *National Union Indemnity Co. vs. Bruce Bros.*, 44 Ariz. 454, 38 Pac. 648, is controlling. In that case, the contract sued upon by Bruce Bros. was not an initial act done by the foreign corporation. The initial act done by the foreign corporation was the making of a contract with the State of Arizona. In the language contained in the opinion, Bruce Bros. "shortly thereafter" entered into the contract which was the subject of the lawsuit. From the opinion, we must conclude that at best the contract involved in the *Bruce Bros.* case, *supra*, was the second formal contract entered into by it within the State of Arizona. Thereafter, according to the opinion, Bruce Bros. carried on an extensive activity within the State of Arizona. Likewise in our case, after the execution

of the lease, the appellant carried on an extensive activity within the state.

The majority of the Court has misinterpreted the language of the Arizona Supreme Court, indicating that in order to come within the foreign corporation statute "a corporation must be engaged in an enterprise of some permanence and durability, and must transact within the state some substantial part of its ordinary business and not merely a single act." The majority construes this to mean that until a substantial part of its business is being done in Arizona, or until its business is a durable one of some permanence, anything done by a foreign corporation prior to qualifying is valid. It is respectfully submitted that neither the Arizona Supreme Court nor the Arizona legislature intended its statutes to be so construed.

The evidence is undisputed in this case that the appellant did engage in Arizona in an enterprise of some permanence and durability and did transact within the state a substantial portion of its ordinary business as opposed to the single act of entering into a lease and nothing more.

The majority opinion disregards the language of the Arizona Supreme Court in the *Bruce Bros.* case, *supra*, as follows:

"The legislature has repeatedly and solemnly declared that any and all of the acts of the corporation are 'void' without qualification or exception of any nature."

In *Pennsylvania Company for Insurance of Lives and Granting Annuities, et al. vs. Bauerle*, (Ill.), 33 N.E. 166, a Pennsylvania corporation had received a gift of property located in Illinois. After receipt of this gift it entered into a contract in Illinois to sell the property, and upon breach of the agreement of sale, the Pennsylvania corporation sued for specific performance. The Pennsylvania corporation had never qualified to do business in the State of Illinois. In declaring the contract of sale to be void and unenforceable because of an Illinois statute similar to the Arizona statute, the Illinois court said as follows:

“So here receiving the land adjoining Chicago by devise, with power to sell and dispose of the same, and the power to lease it, and to collect the rents and profits therefrom, and the assertion in this state of the ownership of said land, and assuming to sell and convey it, and bringing suits in the courts of this state in respect to said land and such alleged ownership, and for the enforcement of contracts in regard to the same, must be held to be doing business in this state within the purview of said section.”

In *Cassidy's, Ltd. vs. Rowan, et al.*, 163 N.Y.S. 1079, a foreign corporation had leased premises in New York and thereafter had subleased the premises. The foreign corporation had never qualified to do business in New York. When it filed suit to collect past due rent from one of its subtenants, the Court held that it was barred from doing so since its acts in subleasing por-

tions of its leased premises constituted doing of business in New York state and since it had not qualified to do business, the subleases were void.

The Supreme Court of Oregon, in *Weiser Land Co. vs. Bohrer*, 152 Pac. 869, in a suit to compel specific performance, held that an Idaho corporation which purchased land in Oregon, gave a mortgage on it, leased it, etc., was doing business in Oregon. Since it had not qualified in accordance with Oregon statutes, the Court refused to compel performance of the covenant upon which the suit was based. The covenant was contained in a mortgage made simultaneously with the contract by which the Idaho corporation acquired the Oregon property.

The Court of Appeals for the 7th Circuit, in *In re Bell Lumber Co.*, 149 F. 2d 980, held that a foreign corporation by contracting to furnish a Wisconsin lumber company plans, designs and services for houses to be prefabricated by the lumber company, was doing business in Wisconsin in violation of the state statute, and hence its contract with the Wisconsin corporation was unenforceable. The contract in this case was the first act. It was a preliminary act.

The appellate court of Indiana in *Lowenmeyer vs. National Lumber Co.*, 125 N.E. 67, had before it a contract by a foreign corporation for the purchase of real estate, which contract was made prior to the foreign corporation's having complied with the Indiana statutes governing such corporations. In an action by the

seller to enforce specific performance of the contract, the Indiana court stated as follows:

“In the instant case, however, it is evident that the act of purchasing the real estate in question does not fall within that class of cases designated isolated transactions. . . . A special finding of facts shows that the foreign corporation in question had the power to acquire and hold such real estate as might be necessary to carry on its business of dealing in coal and fuel, and it can not be said with reason that the act of acquiring a place for the conduct of such business, under the facts found, although in a sense preliminary, did not fall within the inhibition of the statute.”

The same fact situation present in the *Lowenmeyer vs. National Lumber Co.* case, *supra*, is present here. In this case the appellant obtained a lease on premises either for the purpose of conducting a portion of its regular business, or for subleasing the premises to either one of its subsidiary corporations or to another subtenant. In any event, the purpose of the original lease was to enable the appellant to make a profit from the use of the premises.

In *Greene vs. Kentenia Corp.*, (Ky.), 194 S.W. 820, the Kentucky court of appeals held that a foreign corporation which invested its money in timber and mineral lands without attempting to develop them, and which merely held the property as an investment, was doing business within the state. The Kentucky court stated:

“To employ capital by investing it in land and not using the land is, again, to our view, doing business within the sense of that term as used in the statute providing for the tax sought to be enjoined.”

In *Larkin vs. Commonwealth*, (Ky.), 189 S.W. 3, the Kentucky court, in defining “doing business”, stated:

“In other words, business does not mean dry goods, nor cash, nor iron rails and coaches. Business is not these lifeless and dead things, but the activities in which they are employed. When in motion, then the owners are said to be in business.”

One of the senior U. S. District Judges sitting in the U. S. District Court of the District of Montana, Chief Judge Pray, in *Hutterian Brethren of Wolf Creek, as a Church of Sterling, Alberta, Canada, vs. Haas, et al.*, 116 F. Supp. 37, had before him an action in which a Canadian corporation brought a suit against the vendors of real estate for specific performance of a contract between the vendors and the corporation's agent for the sale of real estate. Chief Judge Pray held that the contract was void because of failure of the Canadian corporation to comply with the statutes dealing with foreign corporations doing business in the State of Montana. In this case the Canadian corporation actually had complied with the Montana statutes prior to the time that the litigation was commenced, and its counsel urged that that was sufficient. Nonetheless, Judge Pray refused to “emasculate” and “con-

tradict" the clear language of the Montana statute. In our case, the Massachusetts corporation had not even bothered to comply with the Arizona statutes at the time of trial of this case, almost five years after the lease in question was executed.

In this case, the appellant by the majority opinion of the Court has been permitted to do business in the State of Arizona upon more favorable terms than a domestic corporation could do business. This is prohibited by the Constitution of the State of Arizona, which in Article XIV, Section 5, provides:

"No corporation organized outside of the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law for similar corporations organized under the laws of this state;"

Section 53-901 A.C.A. 1939 Ed., requires every corporation doing business in Arizona to pay an annual fee and to make an annual report. This obviously has never been done by the appellant and notwithstanding that, the appellant in this case is being given the same privileges as a domestic corporation which faithfully complies with Arizona statutes.

Also of interest to this question are the following:

John Hancock Mut. Life Ins. Co. vs. Girard
(Idaho), 64 P. 2d 254;

Davis vs. U. S. Shoe Repairing Machine Co.
(Tex.), 92 S.W. (2) 1107; and

Cadden-Allen, Inc. vs. Trans-Lux News Sign Corp. (Ala.), 48 So. (2d) 428.

II.

Section 53-802 ACA 1939 Ed. provides:

“No foreign corporation shall transact any business in this state until it has complied with the requirements of the preceding section, and every act done by said corporation prior thereto shall be void.”

There is nothing ambiguous about the foregoing section. It does not purport to say, and by no stretch of the imagination does it intimate, that the first or the second, the tenth or twentieth act of a corporation before complying with the Arizona statutes, shall be valid. It simply states that all acts, whether No. 1 or No. 100, are void.

Judge Lockwood, speaking for the Arizona Supreme Court, in *National Union Indemnity Co. vs. Bruce Brothers*, supra, stated,

“But under a statute such as ours, there is no room for construction. The Legislature has repeatedly and solemnly declared that any and all the acts of the corporation are ‘void’, without qualification or exception of any nature.”

Section 53-803 ACA 1939, provides that if any agent of a foreign corporation is absent from the county for a specified time,

“then the right to transact business by the corporation in the county represented by such agent shall cease, and all acts or contracts performed or

made in said county thereafter shall, at the option of any person interested, be null and void."

It seems beyond argument that if the statutory agent appointed by a qualified foreign corporation should absent himself from the county for a period of three months without a successor agent being appointed, such absence should render void any contracts made by the corporation thereafter. Certainly any contracts made by a foreign corporation before appointing an agent are likewise null and void.

The effect of the majority opinion of the Court may be compared to a statement that the first time a person, contrary to statute, operates a motor vehicle without an operator's license, it does not constitute a criminal offense. Likewise, the ruling would indicate that a person could sell liquor one time without a license in the State of Arizona without violating the express provisions of the law. By analogy, the examples that might logically follow from the construction given the Arizona statute by the majority of the Court would run *ad infinitum*.

An opinion of any appellate court which purports to construe a statute should do so in such manner as to serve as a guide for the future. The opinion of the majority in construing Section 53-802 ACA 1939 Ed. does not do this. It furnishes no yardstick for counsel or parties for future guidance. It simply indicates that some act or acts of a foreign corporation prior to

qualifying will be held valid and enforceable. It leaves to conjecture which acts—the first, second or which—will be valid and enforceable. It does not explain how, when the Legislature used the words “every act”, this Court determines the true intention of the Legislature and the meaning of such words were that they would apply only to some acts done sometime after the first act.

If the intent of the Legislature had been as indicated by the majority of the Court, it would have been ridiculously simple for the Legislature to state that the foreign corporation was entitled to do certain acts before being required to qualify. The Legislature did not see fit to grant such privilege, but the majority opinion of the Court does.

CONCLUSION

In conclusion, appellee, Tucson Airport Authority, for all of the reasons heretofore stated, urges that its Petition for Rehearing be granted, that upon rehearing, the judgment of the Court dated February 23, 1956, be vacated, and that judgment be entered affirming the judgment of the Hon. James A. Walsh, District Judge of the United States District Court for the District of Arizona.

Respectfully submitted,

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SHOENHAIR

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/s/ RICHARD B. EVANS

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Tucson, Arizona

Attorneys for Appellee

CERTIFICATE OF COUNSEL

I, RICHARD B. EVANS, one of the attorneys for appellee, Tucson Airport Authority, do hereby certify that in my judgment the foregoing Petition for Re-hearing is well founded and that it is not interposed for delay.

DATED March, 1956.

/s/ RICHARD B. EVANS

No. 14470

United States
Court of Appeals
for the Ninth Circuit

JOHN K. BORG,

Appellant,

vs.

THE TRIBUNE PUBLISHING COMPANY, a
Corporation,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 24)

Appeal from the United States District Court
for the District of Idaho,
Central Division.

FILED

DEC 24 1951

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-10-54

PAUL P. O'BRIEN,
CLERK

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In the United States District Court for the District
of Idaho, Central Division

No. 1951

JOHN K. BORG,

Plaintiff,

vs.

T. C. THOMAS and THE TRIBUNE PUBLISH-
ING COMPANY, a Corporation,

Defendants.

COMPLAINT

Plaintiff complains and alleges:

I.

At all times referred to herein, the defendant Tribune Publishing Company was and is an Idaho corporation, existing under and by virtue of the laws of the State of Idaho, with its principal place of business in Lewiston, Idaho. Said corporation is the owner and publisher of a daily newspaper, known and titled as "The Lewiston Morning Tribune," which paper has a large circulation in the states of Idaho and Washington.

The defendant T. C. Thomas is a resident within the County of Latah, State of Idaho.

II.

The plaintiff, John K. Borg, has for many years heretofore been a resident of Moscow, Idaho. Said plaintiff is now, and has been since September, 1953, a resident of Pullman, Washington, and is em-

ployed as a clerk in the Washington Hotel, in Pullman, Washington. That from January, 1953, to September, 1953, and for many years prior to January, 1953, the plaintiff had been and was a Justice of the Peace, in and for Latah County, State of Idaho, and did, prior to the acts herein complained of, enjoy an excellent reputation for truth, veracity and integrity, and has been a respected citizen.

III.

The jurisdiction of this Court is founded on diversity of citizenship. The amount in controversy, exclusive of interest and costs, exceeds the amount of \$3000.00.

IV.

That the defendant Thomas on or before the 12th day of May, 1953, became the author of a written article concerning this plaintiff, which article, or quotations therefrom, was printed in the Lewiston Morning Tribune on May 13, 1953, with the consent, knowledge and authorization of the defendant Thomas, and circulated throughout the states of Idaho and Washington. That such article and publication was false and untrue, but was written, published and circulated with the intent to, and did, directly, indirectly and by innuendo, accuse the plaintiff of dishonesty, trickery, corruptness and of malfeasance and misfeasance of public office; and with the purpose of destroying plaintiff's reputation, exposing him to public hatred, contempt, ridicule and obloquy, and to deprive him of public confidence.

V.

That said article was false and untrue, particularly in the following respects:

“The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas, commander of the University Naval ROTC unit, of which Shoup was a member.

“Captain Thomas declared that ‘I don’t like the smell of it. I don’t think we have here in this county now the proper administration of justice.’

* * *

“Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol.

* * *

“Legal maneuvers had made it impossible for the prosecuting attorney to get a trial on that charge.

* * *

“At 9 a.m., he added the prosecuting attorney and witnesses and the court reporter appeared at the police court, normally the place where the hearing would be held. But the judge and Estes had gone in the meantime to the district courtroom to hear the case.

“‘This was a ridiculous situation,’ Thomas said.

“‘Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake, it could have been easily rectified simply by lifting a telephone and telling the prosecuting attorney to bring his witnesses and come on over.’

* * *

“But Thomas said these things disturbed him:

* * *

“ ‘The extraordinary circumstance of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendant were in another;

“ ‘Circumstances of the dismissal of the second charge against Estes;

* * *

“ ‘What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we’d go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury.’ ”

VI.

That by reason of the aforesaid article and remarks of the defendant Thomas, and the publication and distribution of the Lewiston Morning Tribune of May 13, in the states of Idaho and Washington, and in miscellaneous other areas, plaintiff has been deprived of public confidence, has suffered embarrassment, humiliation and mental agony, has been held in contempt, calumny, ridicule, and such publication has caused plaintiff’s friends and acquaintances of years standing to avoid the plaintiff, all to his damage in the sum of \$75,000.00.

Wherefore, plaintiff prays for judgment against the defendants T. C. Thomas and the Tribune Pub-

lishing Company, jointly and individually, in the sum of \$75,000.00; for his costs and disbursements herein; and for such other and further relief as to the Court shall seem meet and proper.

J. P. TONKOFF,

ESTES & FELTON,

By /s/ MURRAY ESTES,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 10, 1953.

[Title of District Court and Cause.]

MOTION AND ORDER FOR SPECIAL
APPOINTMENT TO SERVE PROCESS

Comes now the undersigned, of counsel for plaintiff in this cause, and moves for the appointment of Clarence Kyle, a Deputy Sheriff for Nez Perce County, Idaho, or J. F. Jordan, a Deputy Sheriff for Lahah County, Idaho, as individual citizens, to serve summons and complaint in this cause upon the defendants; they, or either of them, to make return to the Clerk of the above-entitled Court upon completion of service.

Dated this 9th day of November, 1953.

/s/ MURRAY ESTES.

ORDER

Upon the above motion, and good cause appearing therefor, it is hereby ordered that Clarence Kyle, a resident of Lewiston, Idaho, or J. F. Jordan, a resident of Moscow, Idaho, be, and they hereby are appointed as individual citizens to serve summons and complaint in this cause upon the defendants; return of service to be made to the Clerk of this Court.

Dated this 16th day of November, 1953.

/s/ CHASE A. CLARK,

United States District Judge.

[Endorsed]: Filed November 16, 1953.

[Title of District Court and Cause.]

ANSWER

The defendant, The Tribune Publishing Company, a corporation, answers plaintiff's Complaint as follows:

First Defense

The Court lacks jurisdiction of the subject matter of the action or the parties thereto.

Second Defense

The Complaint fails to state a cause of action against the defendant upon which relief can be granted.

Third Defense

For answer to plaintiff's Complaint, the defendant admits, denies, and alleges as follows:

I.

For answer to paragraph I, the same is hereby admitted.

II.

For answer to paragraph II, the defendant admits that portion beginning with the word: "The," as the first word in the first line and ending with the word: "Idaho," which appears as the sixth word in line two and reading as follows:

"The plaintiff, John K. Borg, has for many years been a resident of Moscow, Idaho."

Admits that portion beginning with the word: "that," which appears as the third word in the fifth line and ending with the figures: "1953" appearing at the end of line six, and beginning with the word: "the," which appears as the ninth word in line six, and ending with the word: "Idaho," which appears as the first word in the eighth line, all of which admission reads as follows:

"that from January, 1953, to September, 1953, the plaintiff had been and was a Justice of the Peace in and for Latah County, State of Idaho."

Denies, generally and specifically, that portion beginning with the word: "Said," which appears as the seventh word in line two, and ending with the

word: "Washington," which appears as the last word in line three, and reading as follows:

"Said plaintiff is now, and has been since September, 1953, a resident of Pullman, Washington."

Save and except as herein specifically admitted and denied, the defendant has no knowledge or information sufficient to form a belief upon each and every other matter and thing in said paragraph contained, and, therefore, denies the same.

III.

For answer to paragraph III, the defendant denies, generally and specifically, each and every allegation, matter, and thing therein contained, and the whole thereof; Except, the defendant admits that the amount in controversy, exclusive of interest and costs, exceeds the amount of \$3,000.00.

IV.

For answer to paragraph IV, the defendant denies, generally and specifically, each and every allegation, matter, and thing therein contained, and the whole thereof.

V.

For answer to paragraph V, the defendant denies, generally and specifically, each and every allegation, matter, and thing therein contained, and the whole thereof; Except, the defendant admits that the quotations set forth in paragraph V of plaintiff's Complaint were printed and published in The

Lewiston Morning Tribune on May 13, 1953, as parts of an article, the whole of which is hereunto attached, marked Exhibit "A," and by reference made a part hereof.

Further answering said paragraph V, the defendant alleges that said quotations are only extracts from the article and do not constitute the entire article and should be read with the rest of the article, and that the entire article must be read and considered in order to ascertain the purpose, meaning, and intent of the article.

VI.

For answer to paragraph VI, the defendant denies, generally and specifically, each and every allegation, matter, and thing therein contained, and the whole thereof; and specifically denies that the plaintiff, John K. Borg, has been damaged in the sum of \$75,000.00, or any sum whatsoever.

VII.

The defendant denies each and every allegation in said Complaint contained not expressly admitted to be true.

Fourth Defense

For a Separate and Affirmative Defense, the Defendant, The Tribune Publishing Company, Alleges as Follows:

That at all times referred to in plaintiff's Complaint, the defendant, T. C. Thomas, was a Captain in the United States Navy, assigned to duty at the

University of Idaho in Moscow, Idaho, as a professor of Naval Science, and as Commanding Officer of the Naval Reserve Officers' Training Corps Unit at Moscow, Idaho. That the Naval Reserve Officers' Training Corps is a national program for the education and training of citizens to qualify them to serve as officers in the United States Navy and Marine Corps. That during the above-mentioned period, one Richard Shoup, was duly and regularly enrolled as a member of the Moscow Unit of the Naval Reserve Officers' Training Corps, and under the command and jurisdiction of the said defendant, T. C. Thomas, who was responsible for his educational progress and training.

That on or about December 14, 1952, the above-mentioned Richard Shoup became involved in an altercation and combat with one, Murray Estes, in Moscow, Idaho, which resulted in:

1. Estes being charged in the Probate Court of Latah County, Idaho with the crime of: "Assault with a Deadly Weapon—a Felony."

2. Estes being dismissed from the charge filed in the Probate Court and transferred to the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, by John K. Borg, Justice of the said Court, who is the plaintiff in this action.

3. Estes being charged in the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, before Kent Power, Justice of the Peace.

with the offense of: "Assault with a Deadly Weapon."

4. Estes being dismissed from the charge in the Justice Court of the Second Precinct before Kent Power, Justice of the Peace, by Justice of the Peace John K. Borg, who is the plaintiff in this action, before whom said case was transferred.

5. Estes being charged in the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, before Kent Power, Justice of the Peace, with the offense of: "Battery."

6. Estes pleading guilty in the Probate Court of Latah County, Idaho to the charge of Battery, which proceeding was initiated in the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, and being adjudged by said Probate Court to pay a fine of \$100.00 and costs of the prosecution in the sum of \$3.00.

7. Shoup being charged in the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, before Kent Power, Justice of the Peace, with the crime of: "Attempt to Compound a Crime—a Felony."

8. Shoup being dismissed from the charge set forth in the preceding subdivision by Kent Power, Justice of the Peace.

That public interest in and discussion of the institution and disposition of the above-mentioned official, public, judicial proceedings caused a large number of citizens of Latah County, Idaho to peti-

tion the authorities of said County to convene a Grand Jury for an investigation of said proceedings and that, in addition thereto, a great number of citizens held a public meeting in the High School in Moscow, Idaho, on May 12, 1953, where said proceedings and the calling of a Grand Jury to investigate the same, became a matter of public discussion.

That the quotations set forth in paragraph V of plaintiff's Complaint are only parts of an article printed and published in the Lewiston Morning Tribune on May 13, 1953, the whole of which is hereunto attached as Exhibit "A":

That said article was a full and fair report of a public meeting of citizens held in the Moscow High School in Moscow, Idaho on May 12, 1953, for the purpose of discussing the subjects and proceedings of public, official, judicial proceedings theretofore instituted and pending in the Courts of Latah County, State of Idaho.

That the language quoted in paragraph V of plaintiff's Complaint was spoken at said meeting by the defendant, Thomas, and was an expression of his own opinion upon public, official, judicial proceedings, and was made for the purpose of acquainting the citizens and taxpayers of Latah County with matters, which he believed to be, and which were of public interest and for the good and welfare of the citizens of said County and were made without malice or ill feeling toward the plaintiff and that

nothing was said by him for the purpose of injuring the plaintiff in any manner whatsoever.

That the article attached hereto as Exhibit "A" constitutes a true and fair report of the public meeting hereinabove referred to and each and all of the words and statements therein contained, in their natural and ordinary meaning, are substantially true in substance and in fact, and in so far as the words consist of expressions of opinion, they are fair and impartial comments upon the public, official, judicial proceedings referred to, made in good faith, and without malice and upon the said facts, which are a matter of public interest and concern, and were spoken and published for the public benefit and are, therefore, privileged.

That in publishing the matters appearing in Exhibit "A," the defendant, Tribune Publishing Company, believed that the matters and things therein were true and of such general interest to the public to justify its publication and make it incumbent upon it, as a newspaper, to publish the same.

That in publishing said Exhibit "A," the Tribune Publishing Company acted with full right to do so for the benefit of the entire community of Moscow, Idaho and the public in general and under privilege.

That in alleging in this affirmative defense that the statements of fact contained in said Exhibit "A" are substantially true, defendant has reference to every statement of fact in the aforesaid Exhibit "A" and relating to plaintiff and the conduct of

the plaintiff with respect to the matters therein referred to.

Fifth Defense

For a Separate and Affirmative Defense, the Defendant, Tribune Publishing Company Alleges as Follows:

I.

That each and every of the statements quoted in paragraph V of plaintiff's Complaint are true and correct.

Wherefore, this answering defendant prays that plaintiff's action be dismissed, that he take nothing thereby, and that the defendant have and recover its costs and disbursements necessarily expended therein, and that the defendant be granted such other and further, general relief as to the Court may seem warranted upon a hearing.

CLEMENTS & CLEMENTS,

By /s/ V. R. CLEMENTS,
Attorneys for Defendant, The Tribune Publishing
Company.

Grand Jury Demanded

By LADD HAMILTON
(Tribune Staff Writer)

MOSCOW — The most famous legal case in recent Moscow history, which apparently had slimmered down last week, boiled over again Tuesday night amid demands for a grand jury investigation.

About 200 Latah County residents gathered at Moscow High School to protest what one of them termed "a miscarriage of justice" growing out of an incident at a University of Idaho Campus cafe last Dec. 14, involving Richard Shoup, a university student, and Murray Estes, Moscow attorney.

Shoup had charged Estes, after the Dec. 14 affair, with assault with a deadly weapon, and after a long series of legal maneuvers, Estes pleaded guilty last week to a reduced charge of battery and, last week, also, a case which Estes has brought against Shoup, charging an attempt to compound a felony (bribery), was dismissed.

Tuesday night's public meeting came about as the result of an earlier refusal of District Judge Jack McQuade to call a grand jury to investigate possible evidences of injustices during the four-month course of the case.

Among other things, the group:

1. Formed a permanent organization called the Latah County Good Government Association;
2. Agreed that a nominating committee be named to put forward officers, draw up an organizational plan and arrange for further meetings;
3. Authorized D. S. Jeffers, Moscow, chairman of the meeting, to appoint a committee which will poll county residents on the question whether they want a grand jury impeded;
4. Requested Jeffers to inform McQuade that it was the desire of the group that a grand jury be called.

The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas, commander of the University Naval ROTC unit, of which Shoup was a member.

Captain Thomas declared that "I don't like the smell of it. I don't think we have here in this county now the proper administration of justice."

He said the difficulty involving Estes and Shoup began at a party at the downtown Moscow Ad Club which Estes and Maury O'Donnell, who was then prosecuting attorney, both attended.

Shortly after this party, Captain Thomas said, Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol. He did not fire the weapon. The proprietor of the cafe intervened and called police.

Didn't Take Gun

The first police officer who arrived, Captain Thomas said, allowed Estes to depart "and did not take his pistol from him." The

second officer, he said, arrived and took young Shoup to jail, where he was interrogated "for quite a considerable time."

"It was then thoroughly established, Thomas said, "that he was completely innocent, and later Estes admitted that it had been a case of mistaken identity."

Thomas said that Shoup had been dissuaded on numerous occasions from filing any charges against Estes. He pointed out that the first charge was not filed against Estes until about four weeks after the incident had occurred. It was not filed, he said, until Melvin Alsager had replaced O'Donnell as prosecuting attorney.

"Within an hour after Alsager took office the charge was filed," Thomas said. But he added that subsequent legal maneuvers had made it impossible for the prosecuting attorney to get a trial on that charge. He said that it was brought in justice court, scheduled for a hearing at 9 a.m. on the morning of Jan. 15. At 8 a.m. that morning, Thomas said, Alsager called the judge and told him that he would be ready at 9.

At 9 a.m., he added the prosecuting attorney and witnesses and the court reporter appeared at the police court, normally the place where the hearing would be held. But the judge and Estes had gone in the meantime to the district courtroom to hear the case.

"This was a ridiculous situation," Thomas said.

"Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake it could have been easily rectified simply by lifting a telephone and telling the prosecuting attorney to bring his witnesses and come on over."

A second felony charge was filed a few days later the captain said, but this was also dismissed on the ground that there was insufficient evidence upon which to bind Estes over.

"And in the meantime," the captain added, "what has happened to the boy?"

"The strain of the hearing and other legal rigamarole had gotten him down and at mid-year Shoup did badly at his exams. We would have had to drop him from Naval ROTC for poor grades, but with the full concurrence of President (J.E.) Buchanan, we sent a plea to the Navy Department that he be allowed to remain with us for one more term.

"At the end of January, the individual who caused the trouble was scott free and the victim was subject to dismissal from the Navy and in danger of losing his chance to become a Naval officer. It was simply not right."

Later, he said, Shoup's parents came here from McKeesport, Penn., and it was agreed then that a simple battery action would be brought against Estes.

This third charge was filed shortly after Easter.

Captain Thomas said that McQuade had attempted to hold a "quiet, closed trial." Alsager was told to bring in the boy and no other witnesses, Thomas said.

(Continued on Page 5)

Group Demands Grand Jury In Estes Case

(Continued from Page 12)

Alsager had first agreed, but then "when he realized what was happening, he properly refused to go along with it."

The next day a charge was filed against Shoup alleging that he had attempted to compound a felony. Thomas said this charge was "phony and false" and could not have stood up in court.

He said that on April 23 McQuade held a conference in his chambers and that McQuade had dissuaded Thomas from allowing his secretary to take notes. Thomas said he requested that the court reporter take notes and was again dissuaded. Nothing came of that conference, Thomas said.

He said that on the following day he saw an article in the Moscow Daily Idahonian which quoted McQuade as saying that an agreement had been reached by all the principals in the case and that there was no justification for calling a grand jury.

He said the story quoted McQuade as saying that attorneys for both sides objected to the expense of a grand jury except as a last resort. Thomas said that was erroneous, that no such agreement was reached.

On May 5, he said, there was another effort to hold a quiet trial, but he added that Alsager again refused, saying a public trial had been set for May 6 and that was when he intended to have it.

Estes appeared privately before the judge, pleaded guilty to the charge of battery and was fined \$100. After Estes' conviction, the charge against Shoup was dismissed.

"At long last," Captain Thomas said, "we had Shoup freed."

But Thomas said these things disturbed him:

"The failure of the police to arrest Estes on Dec. 14 or to take away his pistol;

"The extraordinary circumstance of dismissing the first battery charge while the prosecutor was in the regular courtroom

and the judge and defendant were in another;

"Circumstances of the dismissal of the second charge against Estes;

"The reasons for the unusual steps which McQuade took to avoid calling a grand jury . . ."

"What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury."

Captain Thomas retired amid heavy applause.

McQuade then declared that Captain Thomas had put forward only the facts which were favorable to his side. And McQuade heatedly denied that he had said what the Moscow newspaper quoted him as saying about the grand jury.

He also denied that he would not allow notes to be taken in his conference with the parties to the case.

He said he had told Thomas it was to be an informal meeting "to get rid of these cases in an orderly manner. It has been my observation that people are reluctant to talk when someone is making notes. I didn't deem it necessary to have the reporter there.

He also said that Thomas had not pressed him for provision to have notes taken, but had asked him merely "would you rather I didn't?"

McQuade said "I repeated throughout the conference that I had called it for the purpose of enlisting their aid in ending this farce that was growing like a mountain. I said it will have a serious effect on the community and the university. As for the grand jury, I hadn't made up my mind."

McQuade said that during this conference he told the attorneys that "I will call the grand jury unless you, Estes, and you, Alsager, stop playing around. I said if you don't do something I'll not only call the grand jury, but I will institute disbarment proceedings against both of you."

"As far as I am concerned, I have not abandoned consideration of the grand jury. I carry no ban-

ner for any side in this case. But I am afraid of injuring a number of innocent people as I know is sometimes the case with a grand jury."

At this point Dr. Hugh Burgess of Moscow offered a motion that the Latah County Good Government group be formed. The motion passed 132 for and 8 against after a brief discussion.

A motion then was made that Jeffers, as temporary chairman, name a nominating committee to include himself, Malcom Neely, the Rev. Carman Mell, Moscow minister, William McQuary, Kendrick newspaper publisher, and Jim Broyles, Potlatch farmer. This motion carried unanimously.

Hints At Other Cases

Mrs. Bernice Brigham, Genesee, declared that "this is not the only case of miscarriage of justice here" and she added that "It is only an indication of the type of justice Latah County has had for a long time."

Dr. R. E. Hosack, University instructor, said that he had been "disturbed by a feeling of uncertainty on the part of Moscow residents over the way local justice has been handled."

"I am also deeply disturbed when a judge throws cold water in the face of the ancient and honorable institution of the grand jury. Grand juries can take the kind of evidence McQuade said he cannot take. I think a grand jury would clear the air."

Clifford Dobler, University law teacher, said that "I don't teach about grand juries but last week I got hold of a book called the Idaho Code. I found that 16 grand jurors get four dollars a day for every day they meet plus 15 cents a mile one way for travelling money." Thus, he said, the grand jury would not be so expensive as McQuade had intimated.

And he added that "the only people who could be injured are the guilty parties."

McQuade offered a correction. He said that grand jurors now get \$6 daily plus 25 cents mileage, which would amount to about \$96 daily while they were in session.

He said he had just returned from South Idaho, where he had observed grand juries in action. In one county, he said, seven men were indicted and not one of them was convicted. But he said that in

order to meet their legal expenses, they had all mortgaged their homes, borrowed on their life insurance, borrowed from relatives and finally had been given a sum of \$13,000 which was gathered by public subscription.

"That's what I mean when I say innocent people can be hurt."

'Immunity' Cited

Dr. Paul Eke, former University instructor, said "there is a feeling in this community that people in certain classes are immune to the law. The best thing for us would be a complete change from top to bottom."

Hosack declared that it would be worth \$96 plus expenses to clear the good name of Latah County and he then moved that a group be appointed to canvass the county on the question. The motion passed 63 to 35.

The Rev. W. W. Prall, Presbyterian minister, urged further investigation. "Let's find out first what a grand jury can do," he said. "To be perfectly frank, all I have heard is rumor and I doubt if you can investigate a rumor."

Alsager said a grand jury does have greater power than a prosecuting attorney.

"My difficulty with the Estes case," he went on, "has been mostly with the lower court justices, who seem to be cooperating with the defendant more than with me. I don't mean they should side with me, but they should help me get a case to the right court at the right time."

Dr. Prall said that "I don't believe that at the moment there is anything on which the judge could impanel a grand jury."

To which McQuade replied, "Dr. Prall has put a finger on it. All the petitions in the world won't find a man guilty. The only thing that means anything is evidence. I'm not going to call the grand jury. I'm not going to take a chance on having people hurt."

Mrs. Helen Howard asked him, "If Captain Thomas' facts are true would you accept that as sufficient evidence for the calling of a grand jury?"

McQuade replied, "If they are all true and there are no explanatory facts which neutralize them, it would be proper to bring in a grand jury. But the captain has brought in only one side of this case."

[Endorsed]: Filed March 17, 1954.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find for the defendant, The Tribune Publishing Company, a corporation, and against the plaintiff.

/s/ WAYNE A. JOHNSON,
Foreman.

[Endorsed]: Filed April 8, 1954.

In the United States District Court for the District
of Idaho, Central Division

No. 1951

JOHN K. BORG,

Plaintiff,

vs.

THE TRIBUNE PUBLISHING COMPANY, a
Corporation,

Defendant.

JUDGMENT

This cause came on for trial before the Court and jury on April 5, 1954, et seq., both parties appearing by counsel, and the issues having been duly tried, and the Court having directed the jury to render a verdict for defendant,

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is Ordered and Adjudged that the plaintiff take nothing upon his complaint herein, and that the defendant, The Tribune Pub-

lishing Company, a corporation, have and recover from the plaintiff its costs and disbursements incurred herein, taxed in the sum of \$104.04.

Dated this 8th day of April, 1954.

[Seal] /s/ ED M. BRYAN,
 Clerk.

[Endorsed]: Filed April 8, 1954.

In the United States District Court for the District
of Idaho, Central Division
No. 1950

JOHN K. BORG,
 Plaintiff,
 vs.

LOUIS A. BOAS and THE NEWS-REVIEW
PUBLISHING COMPANY, INC.,
 Defendants.

No. 1951

JOHN K. BORG,
 Plaintiff,
 vs.

THE TRIBUNE PUBLISHING COMPANY, a
Corporation,
 Defendant.

NOTICE OF APPEAL

To Louis A. Boas and The News-Review Publishing
Company, Inc.. Defendants in Action No. 1950,
and to Maurice H. Greene, Attorney for said

Defendants; and to The Tribune Publishing Company, a Corporation, Defendant in Action No. 1951, and to Clements & Clements, Attorneys for Said Defendant:

You, and each of you, will please take notice that the above-named plaintiff, John K. Borg, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from those certain judgments made and entered in the above-entitled Court, and causes, on the 8th day of April, in favor of the defendants, and against the plaintiff, in each of said actions.

Notice of appeal in the above-entitled causes is combined for the reason that said actions were consolidated for trial, and a single record of evidence was adduced, which is applicable to said actions jointly.

Dated this 7th day of May, 1954.

J. P. TONKOFF,
MURRAY ESTES,

By /s/ MURRAY ESTES,
Attorneys for Plaintiff.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

No. 1950 and No. 1951

STATEMENT OF POINTS RELIED ON BY
PLAINTIFF FOR REVERSAL OF JUDGMENT

Comes now the plaintiff in the above-entitled causes, which were consolidated for trial, and files the following statement of points, relied upon by the plaintiff for reversal of the judgment entered in said actions by the United States District Court, for the District of Idaho, Central Division, on the 8th day of April, 1954.

I.

The Court erred in rejecting Exhibits Nos. 2, 3, 4 and 5, offered in evidence by the plaintiff.

II.

The Court erred in sustaining defendant's objections to plaintiff's offer of evidence to establish the circulation of the articles complained of, and the impression and understanding created by such articles upon the readers thereof.

III.

The Court erred in permitting into evidence Exhibit No. 23.

IV.

The Court erred in permitting into evidence Exhibit No. 12.

V.

The Court erred in directing the jury to return a

verdict in favor of the defendants and against the plaintiff, and in directing the entry of judgment in accordance with such verdict.

Dated this 8th day of May, 1954.

J. P. TONKOFF,

MURRAY ESTES,

By /s/ MURRAY ESTES,

Attorneys for Plaintiff.

[Endorsed]: Filed May 12, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,

District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP), to wit:

1. Complaint.
2. Answer.
3. Verdict.
4. Judgment.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this 31st day of July, 1954.

CLERK.

[Endorsed]: No. 14470. United States Court of Appeals for the Ninth Circuit. John K. Borg, Appellant, vs. The Tribune Publishing Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Central Division.

Filed August 4, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14471

United States
Court of Appeals
for the Ninth Circuit

THE QUAKER OATS COMPANY, a corporation,
Appellant,
vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS
and CHARLEY GEERS, Appellees.

THE QUAKER OATS COMPANY, a corporation,
Appellant,
vs.

CHARLEY GEERS, Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern
District of California, Central Division

FILED

DEC 20 1954

PAUL P. O'BRIEN,
CLERK

No. 14471

United States
Court of Appeals
for the Ninth Circuit

THE QUAKER OATS COMPANY, a corporation,
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Transcript of Record

Appeals from the United States District Court for the Southern
District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee Charley Geers:

CHARLEY GEERS, in Pro Per.
1248 Bothwell Street,
Colton, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.



In the United States District Court for the Southern District of California, Central Division

No. 14690-C.

THE QUAKER OATS COMPANY, a corporation,
Plaintiff,

vs.

JOHN J. COUCH, CHARLEY GEERS, D. R. LEWIS, J. F. SCHRIMSHER, individually and doing business as Thrifty Poultry Company; ABRAM B. BUCHNER and FRANCES JANE BUCHNER, individually and doing business as Downey Poultry & Rabbit Supply Company,
Defendants.

COMPLAINT FOR CONVERSION OF MORTGAGED PROPERTY

Plaintiff complains and alleges:

1. Plaintiff, The Quaker Oats Company, a corporation, is now and at all times herein mentioned has been a corporation duly organized under and existing by virtue of the laws of the State of New Jersey and doing business within the State of California and having an office and place of business within Los Angeles County, within said district and division. [2]

2. The defendant D. R. Lewis is now and at all times mentioned herein has been a citizen of the State of California, resident within said district and division. The defendant J. F. Schrimsher is now and at all times mentioned herein has been a citi-

zen of the State of California, resident within said district and division, and does business under the fictitious firm name and style of Thrifty Poultry Company therein. The defendants Abram B. Buchner and Frances Jane Buchner are now and at all times herein mentioned have been citizens of the State of California, resident within said district and division, and do business under the fictitious firm name and style of Downey Poultry & Rabbit Supply Company.

3. The defendants John J. Couch and Charley Geers are now and at all times herein mentioned have been citizens of the State of California, resident within said district, and are and have been co-partners doing business therein under the fictitious firm name and style of Park Avenue Poultry Company, at Riverside, County of Riverside, State of California.

4. The amount involved herein, exclusive of interest and costs, exceeds the sum of \$3,000.00.

5. Heretofore and during or about the month of August, 1952, the plaintiff was the owner and holder of certain chattel mortgages pertaining to approximately 1,500 live and animate turkeys therein described and listed and which, when mortgaged, had been located upon the real properties of the therein named mortgagors. That said chattel mortgages were given and made for valuable considerations and each was acknowledged, and both were duly recorded in the office of the County Recorder of Riverside County, California. One of said mortgages was executed and given to plaintiff by one

Carl W. Ohlson and Marian T. Ohlson and was recorded in Book 1356, page 574, Records [3] of Riverside County, California. The second of said mortgages was executed and given to plaintiff by one Harry T. McVickers and Ruth E. McVickers and was recorded in Book 1356, page 541, Records of Riverside County, California. Both were there recorded upon the 4th day of April, 1952, in accordance with the recording acts of the State of California. Photostatic copies of said chattel mortgages are attached hereto, marked Exhibits A and B respectively, and by reference made a part hereof as though here set forth in full.

6. Said mortgages had not been discharged and were in full force and effect during the month of August, 1952.

7. That during or about said month of August, 1952, the defendants wrongfully removed from Riverside County, California, to Los Angeles County, California, and wrongfully converted to their own use said 1500 live turkeys, which weighed approximately 20 pounds each and which were the subject of said mortgages, and upon which plaintiff had a lien. The reasonable value of said turkeys was \$9,600.00.

8. Plaintiff has been damaged in said sum and has expended in addition thereto approximately \$800.00 in the pursuit and tracing of said turkeys.

Wherefore, plaintiff prays judgment against said defendants, jointly and severally, for the sum of

\$10,400.00 together with interest thereon, and for the costs of suit herein expended.

/s/ GEORGE R. MAURY,
Attorney for Plaintiff [4]

EXHIBIT "A"

Chattel Mortgage

Carl W. and Marian T. Ohlson, Mortgagor, hereinafter called Grower, of Perris, County of Riverside, California, for the consideration hereinafter named, hereby mortgages to Swift & Co., Fontana, and The Quaker Oats Company, a corporation with a place of business in Los Angeles, California, Mortgagees, the following personal property:

Type of Poultry: Turkeys.

Number of Head: 1601.

Breed: Broad Breasted Bronze.

Approximate Age: Day old.

being all poultry of this type owned by Grower together with all increase thereof, all replacements thereof and all additions thereto, and all unused feed and grain, said poultry, and all unused feed and grain, being located on premises in the County of Riverside, California, described as E. 5 acres of Lot 35 Tract 2 of Nuevo Land Company, Maps Book 9 Page 56, Riverside County, which premises are sometimes known as.....

This mortgage is given in consideration of monies advanced by said Swift & Company as part payment for poults purchased by Grower which indebtedness is evidenced by promissory note, dated

the....day of...., 19... payable on or before the 31st day of December, 1952, in the principal amount of \$3,600.00.

This mortgage is further given in consideration of the extension of credit by The Quaker Oats Company for the purchase of feed, grain and grit from this date to December 31, 1952, in an amount not to exceed \$22,500.00.

Provided that if Grower shall pay to Swift & Co. the amount of said note with interest, when due, and shall pay to The Quaker Oats Company on or before December 31, 1952, all amounts of money not in excess of \$26,100.00 becoming due because of credit extended by The Quaker Oats Company from this date to December 31, 1952, then this mortgage shall be void, otherwise to remain in full force and effect.

Provided, further, that if Grower shall default in paying the amounts of money aforesaid when due; or if the Mortgagees or either of them shall feel insecure; or if Grower shall remove any part of the mortgaged property from the above described premises; or if Grower shall sell or assign or attempt to sell or assign any part of the mortgaged property without the prior written consent of Mortgagees; or if Grower shall breach any provisions of that Grower agreement dated March 18, 1952; Mortgagees or either of them may, without notice to Grower, declare all said amounts of money immediately due and payable and may, without notice to Grower, take possession of the mortgaged property and sell and dispose of said mortgaged property in

the manner prescribed by law and from the proceeds of such sale may pay all prior liens and retain all costs and charges, including attorney's fees, in connection with the taking of possession, care and sale of the mortgaged property, together with said amounts of money due and payable, rendering the surplus, if any, to the Grower. In the event a deficiency exists Grower will immediately pay Mortgagees the amount of the deficiency.

The word "Grower" shall be construed in the singular or plural sense as the context requires. This Chattel Mortgage shall be jointly and severally binding upon all persons signing as Grower.

Witness the hand and seal of Grower this 18 day of March, 1952.

/s/ CARL W. OHLSON [Seal]
Grower

/s/ MARIAN T. OHLSON [Seal]
Grower

Witness: Signed William B. Brooks.

State of California,

County of Riverside—ss.

On this 18 day of March, 1952, before me, Stella M. Broesawle, a notary public in and for the said county and state, residing therein, duly commissioned and sworn, personally appeared Carl W. Ohlson-Marian T. Ohlson, known to me to be the person(s) whose name(s) is (are) subscribed to the

This mortgage is given in consideration of monies advanced by said Swift & Company as part payment for poultis purchased by Grower which indebtedness is evidenced by promissory note, dated the ...day of...., 19... payable on or before the 31st day of December, 1952, in the principal amount of \$3,000.00.

This mortgage is further given in consideration of the extension of credit by The Quaker Oats Company for the purchase of feed, grain and grit from this date to December 31, 1952, in an amount not to exceed \$20,000.00.

Provided that if Grower shall pay to Swift & Co. the amount of said note with interest, when due, and shall pay to The Quaker Oats Company on or before December 31, 1952, all amounts of money not in excess of \$23,000.00 becoming due because of credit extended by The Quaker Oats Company from this date to December 31, 1952, then this mortgage shall be void, otherwise to remain in full force and effect.

Provided, further, that if Grower shall default in paying the amounts of money aforesaid when due; or if the Mortgagees or either of them shall feel insecure; or if Grower shall remove any part of the mortgaged property from the above described premises; or if Grower shall sell or assign or attempt to sell or assign any part of the mortgaged property without the prior written consent of Mortgagees; or if Grower shall breach any provisions of that Grower agreement dated....., 19...; Mortgagees or either of them may, without notice to Grower,

declare all said amounts of money immediately due and payable and may, without notice to Grower, take possession of the mortgaged property and sell and dispose of said mortgaged property in the manner prescribed by law and from the proceeds of such sale may pay all prior liens and retain all costs and charges, including attorney's fees, in connection with the taking of possession, care and sale of the mortgaged property, together with said amounts of money due and payable, rendering the surplus, if any, to the Grower. In the event a deficiency exists Grower will immediately pay Mortgagees the amount of the deficiency.

The word "Grower" shall be construed in the singular or plural sense as the context requires. This Chattel Mortgage shall be jointly and severally binding upon all persons signing as Grower.

Witness the hand and seal of Grower this 19 day of March, 1952.

/s/ HARRY McVICKERS [Seal]
Grower

/s/ RUTH E. McVICKERS [Seal]
Grower

Witness: Signed William B. Brooks.

State of California,
County of Riverside—ss.

On this 19th day of March, 1952, before me, E. Vivian Leech, a notary public in and for the said county and state, residing therein, duly commissioned and sworn, personally appeared Harry Mc-

Vickers, Ruth E. McVickers, known to me to be the person(s) whose name(s) is (are) subscribed to the within chattel mortgage and acknowledged that he (they) executed the same.

[Seal] /s/ E. VIVIAN LEECH,
Notary Public [7]

Received and Recorded April 4, 1952. Book 1356,
page 541. Jack A. Ross, Recorder. [8]

[Endorsed]: Filed November 3, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, W. E. McKIBBEN, A. B. CARTER, and O. R. LEWIS

Come Now W. E. McKibben and A. B. Carter, co-partners doing business as Downey Rabbit and Poultry Company, who were erroneously sued herein as Abram B. Buchner and Frances Jane Buchner, and O. R. Lewis, an individual doing business as Thrifty Poultry Company, who was erroneously sued herein as D. R. Lewis, severing themselves from their co-defendants, answer the complaint on file herein by admitting, denying, and alleging as follows:

I.

Answering Paragraphs 2, 3, 5, and 6 thereof, these defendants allege that they have no information or belief as to the allegations contained therein, and basing their denial on said lack of information and belief, deny each and every allegation con-

tained therein, both generally and specifically, the same as though said denials were set forth herein in detail. [9]

II.

Answering Paragraphs 7 and 8 of said complaint, these defendants deny that they removed from Riverside County any of the turkeys set forth in said paragraph; deny that they have converted to their own use any turkeys which were the property of plaintiff or which were the subject of the mortgages set forth in said complaint. These defendants deny that they purchased any turkeys from Carl W. Ohlson or Marian T. Ohlson, the mortgagors set forth in Exhibit A of said complaint, or from Harry McVickers or Ruth McVickers, the mortgagors set forth in Exhibit B of said complaint; deny that plaintiff has been damaged in the sum of \$9,600.00 or in the sum of \$800.00 or in any other sum.

For Separate and Distinct Defense These Defendants Allege:

I.

That they are informed and believe that it is the common practice in the turkey-growing trade that mortgagors may sell said mortgaged turkeys, providing any check given in payment thereof is made payable jointly to mortgagors and mortgagees. These defendants are further informed and believe that defendants John J. Couch and Charley Geers purchased certain turkeys from the mortgagors set forth in Exhibits A and B attached to said com-

plaint, and that the check in payment thereof was made payable jointly to mortgagors and plaintiff. These defendants are further informed and believe that plaintiff and aforesaid mortgagors accepted said check in full payment of all claims for turkeys delivered to defendants John J. Couch and Charley Geers.

II.

Your answering defendants admit that they have bought certain turkeys from defendants John J. Couch and Charley Geers, but allege that they have no knowledge of the source of said turkeys nor whether said turkeys were formerly the property of plaintiff and [10] mortgagors set forth in said complaint and exhibits, and allege that said purchase was in Los Angeles County, California, and was for value.

III.

That by so accepting said checks and payment and by so following the common practice in said trade, plaintiff has designated the aforesaid mortgagors as their agents for the purpose of mortgaging sales of said turkeys. That, if defendant purchased any of the turkeys set forth in said complaint, they were relying upon the common practice in the trade and acted in good faith without prior knowledge of claims of plaintiff. That any claims plaintiff might have had therein are not valid against these defendants by reason of their holding out said mortgagees as their agents for purposes of sale.

IV.

That these defendants have been forced to defend this lawsuit at an expense to them of approximately \$500.00, all of which is to their damage.

Wherefore these defendants pray that plaintiff take nothing by its complaint and that defendants be awarded their costs of defending said suit, together with court costs therein.

/s/ FRANK C. NIMOCKS,
Attorney for Defendants, W. E. McKibben, A. B.
Carter, and O. R. Lewis. [11]

Duly Verified.

Affidavit of Service by Mail attached. [12]

[Endorsed]: Filed November 21, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now John J. Couch, sued herein individually and doing business as Thrifty Poultry Company with Charley Geers, D. R. Lewis and J. F. Schrimsher, and answering for himself alone Plaintiff's complaint on file herein, admits, denies and alleges:

I.

Admits Paragraphs I, II and IV of said complaint.

II.

Answering Paragraph III thereof, this Defend-

ant admits that he is now and at all times therein mentioned has been a citizen of the State of California, resident within said district and denies that he and Defendant Charley Geers are or ever have been [13] co-partners doing business therein or any other place under the fictitious firm name and style of Park Avenue Poultry Company, or any other style or fictitious name whatsoever, or in any other manner whatsoever, at Riverside, County of Riverside, State of California, or at any place at all.

This Defendant alleges that he as an individual and alone is doing business under the fictitious name and style of "Park Avenue Poultry Co." at 4398 Park Avenue, Riverside, California.

III.

Admits Paragraphs V and VI of said complaint.

IV.

Answering Paragraph VII of said complaint, this Defendant denies generally and specifically each and every allegation, matter and/or thing therein contained and denies that he has wrongfully removed from Riverside County, California, or any other place or at all, and/or wrongfully converted to his use said 1500 live turkeys, or any turkeys at all, any turkeys upon which Plaintiff had a lien; also, denies that the value of said turkeys alleged to be wrongfully removed and wrongfully converted was of the value of \$9,600.00 or any other sum or any sum whatsoever.

V.

Answering Paragraph VIII of said complaint this Defendant denies that Plaintiff was damaged as therein alleged in the sum of \$800.00 or any other sum or any sum whatsoever.

As a Further, Separate and Distinct Defense, This Defendant Alleges:

I.

That one Mr. Brooks is the general field manager of Plaintiff herein. That prior to the alleged act of removing said turkeys, as set out in said complaint, the said Plaintiff and Plaintiff's general field manager, authorized, agreed to and sanctioned and [14] gave permission to the said Carl W. Ohlson, Marian T. Ohlson, Harry T. McVickers and Ruth E. McVickers, to deal with Defendants herein, except this answering Defendant, with sale and moving of said alleged mortgaged turkeys, and authorized, agreed to, sanctioned, and gave permission to Defendant Charley Geers, to move, deal for said turkeys with the above-mentioned producers, Harry T. McVickers and Ruth E. McVickers. That this Defendant was informed of the foregoing and believed same to be true and relying on said information and belief, did, during the month of August, 1952, use his truck and did transport one load of live turkeys from the McVickers' property in Riverside County, California, to the "Thrifty Poultry Company", for and on behalf of Defendant, Charley Geers. That said load of turkeys weighed approximately 4000 pounds. That this Defendant did not deal with

Harry T. McVickers or Ruth E. McVickers, but only moved said turkeys for Defendant Charley Geers; that this Defendant delivered said turkeys to the "Thrifty Poultry Company" and did not convert said turkeys, or the value thereof, to his use and does not have said turkeys in his possession or under his control.

Wherefore, this Defendant prays that Plaintiff take nothing by reason of its complaint on file herein and that he be dismissed hence with his costs.

/s/ L. DONALD ST. CLAIR,

Attorney for Defendant,

John J. Couch

[15]

Duly Verified.

[16]

Affidavit of Mailing attached.

[Endorsed]: Filed December 22, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant Charley Geers, and separating himself from the other defendants, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs 4 and 5.

II.

Alleges that he has no information or belief suf-

ficient to enable him to answer the allegations of paragraphs 1, 2, and 6, and placing his denial on that ground, denies generally and specifically every allegation of fact in said paragraphs contained.

III.

Denies generally and specifically each and every allegation contained in paragraph 3, except that he admits that he is a citizen of the State of California, and resides within the district court in and for the southern district of California, central division. [17]

IV.

Answering paragraph 7 this answering defendant denies generally and specifically each and every allegation contained therein.

V.

Answering paragraph 8 this answering defendant denies that plaintiff has been damaged in the sum of \$800.00, or in any sum, or at all.

First Affirmative Defense

This answering defendant alleges that on or about August, 1952, one William Brooks, agent, servant, employee, and a field representative for plaintiff, approached this defendant in Perris, California, and authorized and encouraged the defendant to purchase turkeys from Carl W. and Marian T. Ohlson, and from Harry T. McVickers and Ruth E. McVickers. That in accordance with the authority and the request of said William Brooks, this

defendant, at said time and place, purchased turkeys from Carl W. and Marian T. Ohlson, and said purchase was made with the consent of said William Brooks.

Wherefore, defendant prays that the plaintiff take nothing by his Complaint; that defendant recover his costs incurred herein, and for such other and further relief as to the Court may seem proper.

Dated: January 22, 1953.

/s/ CHARLEY GEERS [18]

Affidavit of Mailing attached. [19]

[Endorsed]: Filed January 24, 1953.

[Title of District Court and Cause.]

PRETRIAL STIPULATION

After conference as required by the Pretrial Order herein, at which there appeared George R. Maury, attorney for the plaintiff, and Frank G. Nimocks, attorney for the defendants W. E. McKibben, A. B. Carter and O. R. Lewis, and at which Charley Geers and John J. Couch, other defendants, failed to appear or be represented, it was agreed and stipulated by and between the plaintiff, The Quaker Oats Company, and the defendants W. E. McKibben, A. B. Carter and O. R. Lewis that the first five paragraphs of the Complaint of the plaintiff are true.

It was further stipulated that paragraph num-

bered II of the Answer of the stipulating defendants, i.e., of defendants W. E. McKibben, A. B. Carter and O. R. Lewis, might be amended by the insertion therein on page 2, line 2, of the words "and 8" after the figure "7".

Dated: October 12, 1953.

/s/ GEORGE R. MAURY,
Attorney for Plaintiff

/s/ FRANK C. NIMOCKS,
Attorneys for Named Defendants

[Endorsed]: Filed October 17, 1953. [20]

[Title of District Court and Cause.]

MEMORANDUM OF OPINION

In the above action plaintiff filed a complaint, alleging defendants wrongfully converted to their own use 1500 live turkeys each of which was the subject of a chattel mortgage and upon which the plaintiff had a lien.

Harry McVickers and Carl W. Ohlson are turkey growers near Hemet, Riverside County, California. Plaintiff is in the business of providing poults for turkey growers and furnishing feed for the turkeys until maturity. As a protection for the money advanced for poults and feed to be furnished chattel mortgages are executed covering the turkeys. In this particular case poults were furnished to McVickers and Ohlson and, subsequently, feed was

furnished by plaintiff. [21] A chattel mortgage was obtained from each of the turkey growers, which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mortgage an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded. In due course of time the poults grew to maturity and were ready for sale.

Defendants John J. Couch and Charley Geers were hucksters. They were in the business of buying turkeys from growers, transporting the turkeys to the market in Los Angeles, California, and selling them to processors. The processors, in turn, would slaughter the turkeys and sell either to wholesalers or retailers for ultimate consumption by the general public.

Defendant Couch appeared at the ranches of Harry McVickers and Carl W. Ohlson and purchased the turkeys involved in this proceeding. Most of the purchases were made by the defendant Couch. The turkeys were paid for by checks, made payable to the growers and to the Quaker Oats Company. The turkeys were transported from Riverside County to Los Angeles where they were sold to the defendant processors. All of the checks given in payment for the turkeys involved herein were turned down by the bank, for the reason that there were not sufficient funds in the account to pay the checks when presented. However, checks given for

the first purchase of turkeys from grower McVickers were subsequently deposited and actually cleared. None of the other checks were ever paid.

Evidence in the case disclosed that the business [22] of collecting from the processors and the deposit of the money in the bank was delegated to Geers; defendant Couch's main duty being to contact the farmers, buy the turkeys and transport them to Los Angeles where they were turned over to Geers for sale. Evidence introduced at the trial indicated that at the time the defendant Couch gave checks for the purchase of these turkeys there was sufficient money in bank to cover the checks; but by the time the checks were presented to the bank for payment the account had been depleted to such extent that the checks were turned down by the bank.

Plaintiff contends that it had a valid chattel mortgage on the turkeys herein; that the chattel mortgage was good at the time of sale, and inasmuch as it was never paid for the turkeys plaintiff could maintain this action against the defendant Couch and the processors upon the theory that the turkeys had been unlawfully converted. Prior to the commencement of this action *Geers* was killed in an automobile accident and in consequence was not named as a party defendant.

All parties concede the chattel mortgages were valid. Defendants contend, however, that plaintiff lost its lien upon the turkeys at the time of sale, because the turkeys were sold with the consent of the plaintiff mortgage holder.

Evidence in the case discloses it was the custom of plaintiff to allow its growers to sell their turkeys, the only requirement insisted upon by plaintiff being that if checks were given in the sales, they would be made payable to the grower and to The Quaker Oats Company jointly. Otherwise, the company did not seem to have any control over sale of the turkeys.

However, plaintiff contends the contracts executed [23] between it and the growers provide the turkeys could not be sold without written consent to the sale having first been obtained from the mortgage holder. There is no dispute that such a contract was entered into; but the evidence conclusively shows the provision of the contract relative to obtaining written consent from the mortgage holder before turkeys were sold was waived by the conduct of The Quaker Oats Company. Although plaintiff is engaged in selling feed to numerous turkey growers, in no instance was there any evidence that plaintiff ever complained because of any grower's sale of turkeys without first having obtained the written consent of plaintiff.

Grower Ohlson testified that some time prior to sale of the first lot of turkeys to Couch he had sold a small lot of turkeys (75 or 80 birds) to a small operator; that he did not have written consent from The Quaker Oats Company to sell the birds; that the check in payment was made to himself and The Quaker Oats Company; that he sent the check to The Quaker Oats Company, which was accepted, and that the plaintiff herein at no time protested

that the birds could not be sold without its written consent. He testified he had been dealing with plaintiff for two years and had always sold the turkeys he raised without any written authorization of sale from plaintiff. He sold his turkeys to purchasers who solicited the sales, and the checks made payable to him and The Quaker Oats Company were sent to The Quaker Oats Company. At no time did The Quaker Oats Company complain that turkey sales were made without obtaining its written consent, nor did the plaintiff at any time protest such procedure.

In the case at bar the first lot of turkeys was purchased from grower McVickers. Checks were obtained by [24] McVickers from the defendant Couch, in payment of the first lot of turkeys, which checks were made payable to McVickers and The Quaker Oats Company. The checks were thereupon sent by McVickers to The Quaker Oats Company, and The Quaker Oats Company did not protest in any way, nor did it even suggest to McVickers that he did not have a right to sell the turkeys without first obtaining its written consent. Instead, the checks were accepted by The Quaker Oats Company and deposited in the regular course of business. They were returned by the bank and subsequently were redeposited by The Quaker Oats Company and were finally honored and paid.

Mr. McVickers testified he had been raising turkeys for seven years and had been dealing with The Quaker Oats Company since prior to 1952; that he had always sold the turkeys he raised and had never

had any written authorization from The Quaker Oats Company covering such turkey sales. Although some time elapsed between receipt by The Quaker Oats Company of the first checks from McVickers and subsequent sales by McVickers and Ohlson, the plaintiff did not in any way impress upon growers McVickers and Ohlson that they could not sell the turkeys until plaintiff's written consent had been first obtained.

One of the defendant processors testified he had been in the turkey business for thirty-two years; that he had purchased turkeys from farmers at numerous times; that he had never seen any written authorization from mortgage holders relative to sale of turkeys. He said that he just bought the turkeys from the farmers and made his checks payable to the farmers and the feed men; that he had never contacted a feed man; that he had purchased turkeys which were fed by The Quaker Oats Company, and that at no time did The [25] Quaker Oats Company indicate to him that the farmer could sell turkeys only upon its written authorization.

Plaintiff further contends growers had no authority to sell turkeys except for cash and that acceptance of a check, later dishonored by the bank, was not cash, and consequently there was no sale. However, the evidence conclusively shows it was the custom in the turkey industry to pay farmers by check and not by cash, and that the checks were made payable to the farmers and the feed company. At no time did The Quaker Oats Company suggest to anyone in any manner that checks were

not acceptable. In fact, checks were accepted and treated as cash; and in the case at bar the checks which cleared were made payable to the grower and plaintiff and were accepted by the plaintiff, and plaintiff did not in any way indicate to the grower that such checks in payment would not be acceptable. Plaintiff also contends the mortgage which it had on the turkeys was a valid lien until paid and that there was no payment until the checks cleared.

It is defendants' contention, however, that although there was a valid mortgage, nevertheless, the mortgage lien was extinguished when plaintiff allowed the mortgagor who had possession of the turkeys to sell them; and, consequently, defendants obtained the turkeys free and clear of the mortgage lien in question.

This is no new problem in California, for from the earliest times the courts have been called upon to adjudicate disputes arising over the sale of mortgaged crops and chattels. In 1896 the Supreme Court of California, in *Maier vs. Freeman*, 112 Cal. 8, was called upon to determine the rights of a purchaser of mortgaged sheep which, while in [26] possession of the mortgagor, were sold. In that case the court points out that it was part of the agreement between the parties to the mortgage that the mortgagor should sell the sheep but should deposit the net proceeds of the sale to the credit of the mortgagee. The Court quotes from *White Mountain Bank vs. West*, 46 Me. 15, [Page 12 of the California citation] as follows:

“‘from the time of sale the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him.’”

The Supreme Court of California then went on to say:

“There are many decisions that the mortgagee of chattels may authorize the mortgagor to sell the encumbered property and apply the proceeds of sale upon the debt secured, and that such an agreement does not render the mortgage fraudulent in law, nor affect the lien thereof prior to the sale [citing cases]; but we have found no case in which the lien was held to attach to the proceeds unpaid by the purchaser.” (Emphasis supplied.)

In *Ramsey vs. California Packing Corporation*, 51 Cal. App. 517, which dealt with the sale of mortgaged crops, the Court said (at page 522):

“* * * Obviously, if the crops were removed by and with the consent of the plaintiff, then they were not wrongfully or tortiously removed, and in that case the lien of the mortgage ceased upon such removal by operation of law.” [27]

In that case (the facts of which are somewhat similar to those in the case at bar) the mortgage holder knew that certain portions of the crop had been removed from the premises and sold yet did not take any steps to prevent further removal and sale. The Court continues, at page 528:

“* * *: for, at the time of the purchase of the tomatoes by the Packing Corporation and the corn

by Powers, the lien of the mortgage had prima facie been extinguished by the removal of those crops from the land on which they were grown [citing cases], and it rested upon the mortgagee, if he would still enjoy the benefit of his mortgage security, to rebut that presumption by showing that the crops were removed without his knowledge and consent and that it was, therefore, a tortious removal. And, as before declared, even if it had been shown that the mortgagors had wrongfully removed the crops and sold the same to a third party, it would still be necessary, to bind the latter in an action for damages for such wrongful removal or for the conversion of the crops, further to show that such removal was tortiously effected with his knowledge or by connivance on his part with those wrongfully removing the crop to effect such removal. * * * This agreement (allowing the mortgagors to sell the mortgaged crops and turn over the proceeds of sale to plaintiff and Emerson) amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage." [28]

In *The Valley Bank vs. Hillside Packing Company*, 91 Cal. App. 738, the bank, after loaning money and taking a chattel mortgage upon an orange crop, authorized delivery of the crop to any packing house selected by the mortgagor. At page 741 the Court said:

"* * * The mortgagor's removal without consent of the mortgagee would be tortious. Consent that he may do so would extinguish the mortgage lien."

H. B. Reno vs. A. L. Boyden Company, 115 Cal. App. 697, concerned a chattel mortgage which had been given on an apiary, honey and other personal property. A portion of the honey stored was sold after recordation of the chattel mortgage. In that case the Court found the plaintiff had given the defendant authority to sell the honey, although the plaintiff testified: "I told him the last time he positively couldn't sell that honey unless he paid me \$500 and all interest to date." The Court said (at page 700) that the evidence "clearly shows that he gave defendant Fassel permission to sell the honey on the latter's promise to pay him out of the proceeds \$500 and the interest due, * * * Fassel having sold with plaintiff's consent, there could be no conversion, either in the sale by him or in the purchase by his co-defendant, * * *"

The Court thereupon ruled (page 702) that where: "the property is sold with the consent of the mortgagee, * * * the latter waives his lien and the buyer is protected by the absolute sale." [29]

In one of the latest cases decided by the California courts, I. S. Chapman & Co. vs. Ulery, 15 Cal. App. 2d 452, the Court, after reviewing prior decisions of the California courts relative to the effect of selling mortgaged property with consent of the mortgagee, reiterates the rule that where mortgaged property is sold with consent of the mortgagee, the mortgagee thereupon loses his lien.

In the case at bar the evidence discloses that plaintiff allowed growers to sell turkeys to anyone who would purchase them. When plaintiff per-

mitted the growers to sell mortgaged property, the mortgagee thereupon lost its lien, and removal of the turkeys in question from the ranch of the growers was not tortious.

As a consequence, judgment will be rendered in favor of defendants herein. Counsel for defendants will prepare findings of fact, conclusions of law and judgment in conformity with the opinion expressed herein for presentation for signature on or before the 15th day of May, 1954.

Dated: May 5, 1954.

/s/ HARRY C. WESTOVER,

District Judge

[30]

[Endorsed]: Filed May 5, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on February 24, 1954, before Hon. Harry Westover, Judge Presiding in said Court sitting without a jury, a jury having been expressly waived, George R. Maury, Esq., appearing for plaintiff, Frank C. Nimocks, Esq., appearing for defendants W. E. McKibben, O. R. Lewis and A. B. Carter, and defendant Charley Geers appearing in propria persona; and evidence both oral and documentary having been introduced and the cause sub-

mitted for decision, the Court now makes its findings of fact as follows:

Findings of Fact

1. Harry McVickers and Carl W. Ohlson are turkey growers near Hemet, Riverside County, California. Plaintiff is in the business of providing poultts for turkey growers; poultts were furnished to McVickers and Ohlson and, subsequently, feed was furnished by [31] plaintiff; a chattel mortgage was obtained from each of the turkey growers, which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mortgage an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained plaintiff's written consent. These contracts were never recorded.

2. Defendants John J. Couch and Charley Geers were hucksters, who were in the business of buying turkeys from growers, transporting the turkeys to the market in Los Angeles, California, and selling them to processors. The processors slaughtered the turkeys and sold them either to wholesalers or retailers for ultimate consumption by the general public.

3. Defendant Couch appeared at the ranches of McVickers and Ohlson and purchased the turkeys involved in this proceeding, paying for said purchases by checks, made payable to the growers and to the plaintiff. The turkeys were transported from

Riverside County to Los Angeles where they were sold, without prior actual knowledge of plaintiff's claim by defendants McKibben, Carter and Lewis, to defendants McKibben, Carter and Lewis, who paid the going market price to the hucksters for same. All checks given by Couch and/or Geers in payment for turkeys involved herein were never honored by the bank on which they were drawn for the reason there were not sufficient funds in the account to pay the checks when presented. One check given for the first purchase of turkeys from McVickers was subsequently deposited and honored by the bank on which it was drawn. At the time defendant Couch gave the checks for the purchase of the turkeys there was sufficient money in the bank to cover the checks but by the time the checks were presented for payment the account had been depleted to such extent that the checks were not honored.

4. It is true that, notwithstanding the written unrecorded [32] contracts between plaintiff and growers, it was the custom of plaintiff to allow its growers to sell their turkeys, the only requirement of plaintiff being that if checks were given in the sales, those checks must be made payable jointly to the grower and to plaintiff. It is also true that plaintiff never complained because of any grower's sale of turkeys without first having obtained the prior written consent of plaintiff and that no prior written consent of plaintiff was obtained before any of the sales of the turkeys involved herein. It is also true that the foregoing practices were the practices

generally followed throughout the turkey raising industry.

5. It is true that although all the transactions involved herein were carried on by payment by check, all parties treated the same as cash transactions.

6. That the allegations contained in paragraphs 1, 3, 4, 5 and 6 of said complaint are true.

7. That the allegations contained in paragraph 2 of said complaint are untrue; it is true that defendants W. E. McKibben and A. B. Carter, at all times mentioned in said complaint, were citizens of the State of California and residents within said district and division and were doing business under the fictitious name and style of Downey Rabbit & Poultry Company; it is true that defendant O. R. Lewis, at all times mentioned in said complaint, was a citizen of the State of California and a resident within the said district and division and was doing business under the fictitious name and style of Thrifty Poultry Company.

8. That the allegations contained in paragraphs 7 and 8 of said complaint are not true.

9. That the allegations contained in paragraphs I, II and III of Separate and Distinct Defense of Answer of defendants W. E. McKibben, A. B. Carter and O. R. Lewis, are true. [33]

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter.

2. The mortgages held by plaintiff on the turkeys

of McVickers and Ohlson were valid and subsisting prior liens against said turkeys until the date of sale of said birds by the growers to Couch and/or Geers.

3. That plaintiff's mortgage lien on said turkeys was extinguished by plaintiff's allowing growers to sell said birds, said practice being, in law, the equivalent to plaintiff's waiving its lien rights. Therefore, the sales to defendants did not constitute a conversion of said birds and title to said birds passed to defendants free and clear of any claims of plaintiff.

4. That all sales herein were cash sales.

5. That all defendants are entitled to judgment as against plaintiff on said complaint, and are entitled to their costs expended.

Dated this 7th day of June, 1954.

/s/ HARRY C. WESTOVER,

Judge of U. S. District Court [34]

Affidavit of Service by Mail attached.

[Endorsed]: Lodged May 17, 1954.

[Endorsed]: Filed June 7, 1954.

In the District Court of the United States, Southern District of California, Central Division

No. 14690-HW

THE QUAKER OATS COMPANY, a corporation,
Plaintiff,

vs.

JOHN J. COUCH, et al, Defendants.

FINAL JUDGMENT

The above-entitled cause came on regularly for trial on February 24, 1954, before Hon. Harry Westover, Judge Presiding in said Court sitting without a jury, a jury having been expressly waived, George R. Maury, Esq., appearing for plaintiff, Frank C. Nimocks, Esq., appearing for defendants W. E. McKibben, O. R. Lewis and A. B. Carter, and defendant Charley Geers appearing in propria persona; and the Court having heard the testimony and having examined the proofs offered by the respective parties; and the Court being fully advised in the premises and having filed herein its findings of fact and conclusions of law and having directed that judgment be entered in accordance therewith;

It Is Hereby Ordered, Adjudged and Decreed:

1. This court has jurisdiction of the parties and of the subject matter hereof. [35]

2. That plaintiff take nothing by its complaint and that judgment will be entered herein in favor of defendants W. E. McKibben, A. B. Carter, O. R.

Lewis and Charley Geers on said complaint and for defendants' costs expended herein.

Dated this 7th day of June, 1954.

/s/ HARRY C. WESTOVER,

United States District Judge [36]

Affidavit of Service by Mail attached.

[Endorsed]: Lodged May 17, 1954.

[Endorsed]: Judgment Docketed and Entered June 7, 1954.

[Endorsed]: Filed June 7, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on trial on the 24th day of February, 1954, before Honorable Harry C. Westover, District Judge in the United States District Court, Southern District of California, Central Division, before the court, sitting without a jury, a jury having been waived, George R. Maury appeared as counsel for plaintiff and the defendant, Charley Geers, appeared in pro-per, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the court being fully ad-

vised in the premises, now makes its findings of fact as follows:

Findings of Fact

1. That on or about August 2, 1952, plaintiff, a corporation organized under the laws of the State of New Jersey, was doing business within the State of California and was engaged in the business of providing poults for turkey growers and furnishing feed for the turkeys until maturity.

2. That in August, 1952, the defendants, Charley Geers and John J. [37] Couch, were hucksters engaged in the business of buying turkeys from growers, transporting turkeys to market in Los Angeles, California and selling them to processors; that the defendant, John J. Couch's main duty was to contact the farmers, buy the turkeys and transport them to Los Angeles, California where they were turned over to the defendant, Charley Geers, for sale; that the main duty of the defendant, Charley Geers was to collect from processors and to deposit the proceeds in the bank.

3. That on or about August 2, 1952 plaintiff was the owner and holder of two chattel mortgages pertaining to approximately 1500 live turkeys; one chattel mortgage was executed by Carl W. Ohlson and Marian T. Ohlson and was recorded in Book 1356, page 574, records of Riverside County; and the second mortgage was executed by Harry T. McVickers and Ruth E. McVickers and recorded in Book 1356, page 541, records of Riverside County. That these mortgages were executed as security for poults and feed furnished by plaintiff to Harry T.

McVickers and Ruth E. McVickers and Carl W. Ohlson and Marian T. Ohlson.

4. That at the time of the execution of the chattel mortgages an additional contract was entered into between Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marian T. Ohlson by which Harry T. McVickers and Ruth E. McVickers, and Carl W. Ohlson and Marian T. Ohlson agreed not to sell any of the turkeys without written consent of plaintiff; that this written contract was not recorded.

5. That in the month of August, 1952 turkeys were purchased in Riverside County from Harry T. McVickers and Ruth E. McVickers by John J. Couch who gave Harry T. McVickers and Ruth E. McVickers checks payable to Harry T. McVickers and Ruth E. McVickers and Quaker Oats Company; that these checks were signed by Harry T. McVickers, Ruth E. McVickers and Quaker Oats Company and were accepted by Quaker Oats Company and deposited in the regular course of business; that these [38] checks in payment for the first batch of turkeys purchased were refused by the bank as there was not sufficient funds on deposit to pay said checks; that these checks were later deposited by plaintiff and were paid; that at the time of the purchase of these turkeys Harry T. McVickers and Ruth E. McVickers did not have written consent from Quaker Oats Company to sell said turkeys and Quaker Oats did not notify Harry T. McVickers and Ruth E. McVickers or defendant, Charley Geers, that they did not have the right

to sell turkeys without obtaining plaintiff's written consent.

6. That in the month of August, 1952 the defendant, John J. Couch, purchased turkeys from Carl W. Ohlson and Marian T. Ohlson and paid for the turkeys by a check payable to Carl W. Ohlson and Marian T. Ohlson and Quaker Oats; that at the time of the purchase of these turkeys Carl W. Ohlson and Marian T. Ohlson did not have written consent from the plaintiff to sell said turkeys; that the plaintiff accepted said checks and deposited them in the regular course of business and at no time notified Carl W. Ohlson and Marian T. Ohlson or the defendant, Charley Geers, that they did not have the right to sell said turkeys without first obtaining plaintiff's written consent.

7. That all of the checks, other than the checks given to Harry T. and Ruth E. McVickers for the purchase of the first batch of turkeys, given in payment for turkeys were not paid by the bank as there was not sufficient funds on deposit with which to pay these checks; that at the time these checks, on which payment was refused by the bank, were given by John J. Couch to the growers and plaintiff there was sufficient money on deposit in the bank to cover the amount of the checks.

8. That the plaintiff allowed the growers, Harry T. McVickers and Ruth E. McVickers, Carl W. Ohlson and Marian T. Ohlson to sell turkeys to the defendants, John J. Couch and Charley Geers and did not require written consent to be given to Harry T. McVickers and Ruth E. [39] McVickers, Carl

W. Ohlson and Marian T. Ohlson before making said sales.

9. That plaintiff permitted Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marian T. Ohlson, growers in possession of the turkeys, to sell said turkeys without securing written permission from plaintiff and that plaintiff's lien was extinguished and the defendant, Charley Geers, obtained the turkeys free and clear of the mortgage lien and the removal and sale of the turkeys was with plaintiff's consent and the removal and sale of the turkeys was not tortious.

10. That at the time of the purchase of said turkeys by John J. Couch and Charley Geers from Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marian T. Ohlson the plaintiff had lost its lien as they had given consent to Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marian T. Ohlson to sell turkeys without consent of the plaintiff.

11. That the custom in the turkey industry in August of 1952 was to pay farmers by check payable to the farmers and to the feed company and that the custom in the turkey business was that these checks would be accepted and were treated as cash.

12. That each and all of the allegations set forth in Paragraphs VI, VII, and VIII, inclusive, of plaintiff's complaint are untrue.

13. That each and all of the allegations set forth in Paragraphs IV and V of defendant's answer and defendant's first affirmative defense are true.

From the foregoing facts, the Court concludes:

Conclusions of Law

1. That plaintiff is not entitled to judgment against defendant.
2. That defendant be given judgment for his court costs.

Done in Open Court this 7th day of June, 1954.

/s/ HARRY C. WESTOVER,

District Judge [40]

Affidavit of Service by Mail attached. [41]

[Endorsed]: Lodged May 26, 1954.

[Endorsed]: Filed June 7, 1954.

In the United States District Court for the Southern District of California, Central Division

No. 14690-HW

THE QUAKER OATS COMPANY, a corporation,
Plaintiff,

vs.

JOHN J. COUCH, CHARLEY GEERS, D. R.
LEWIS, et al., Defendants.

JUDGMENT

The above entitled cause having come on regularly for trial on the 24th day of February, 1954, before the Honorable Harry C. Westover, District

Judge in the United States District Court, Southern District of California, Central Division, before the court, sitting without a jury, a jury having been waived, George R. Maury appearing as counsel for plaintiff and the defendant, Charley Geers, appearing in pro-per, the court having heard all the testimony, and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision and the Court being fully advised in the premises and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith:

Now, Therefore, by reason of the law and the findings aforesaid:

It Is Hereby, Ordered, Adjudged and Decreed:

I.

That plaintiff take nothing by his suit filed herein and that the defendant have judgment against the plaintiff for costs of suit [42] in the sum of \$.

Dated this 7th day of June, 1954.

/s/ HARRY C. WESTOVER,

District Judge

[43]

[Endorsed]: Lodged May 26, 1954.

[Endorsed]: Judgment Docketed and Entered June 7, 1954.

[Endorsed]: Filed June 7, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Quaker Oats Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that certain judgment herein docketed and entered on June 7, 1954, in the above entitled action in favor of the defendants W. E. McKibben, A. B. Carter, O. R. Lewis, and Charley Geers and against the plaintiff herein, wherein said judgment, among other things, states as follows, in part:

“It Is Hereby Ordered, Adjudged and Decreed:

“1. This court has jurisdiction of the parties and of the subject matter hereof.

“2. That plaintiff take nothing by its complaint and that judgment will be entered herein in favor of defendants W. E. [44] McKibben, A. B. Carter, O. R. Lewis and Charley Geers on said complaint and for defendants’ costs expended herein.”

Said appeal is taken from said judgment and from all thereof.

Dated: June 11, 1954.

MAURY, LARSEN & HUNT,
/s/ By GEORGE R. MAURY,
Attorneys for Plaintiff [45]

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Quaker Oats Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that certain judgment herein docketed and entered on June 7, 1954, in the above entitled action, as submitted by the defendant Charley Geers, and which reads, among other things, as follows, in part:

“It Is Hereby Ordered, Adjudged and Decreed:

I.

“That plaintiff take nothing by his suit filed herein and that the defendant have judgment against the plaintiff for costs of suit in the sum of \$.” [46]

Said appeal is taken from said judgment and from all thereof.

Dated: June 11, 1954.

MAURY, LARSEN & HUNT,
/s/ By GEORGE R. MAURY,
Attorneys for Plaintiff [47]

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 52, inclusive, contain the original Complaint; Separate Answers of W. E. McKibben, et al., John J. Couch, etc., and Charley Geers; Pre-trial Stipulation; Memorandum of Opinion; Findings of Fact and Conclusions of Law as to Defendants W. E. McKibben, et al., and as to Charley Geers; Judgment as to Defendants W. E. McKibben, et al., and as to Charley Geers; Two Notices of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeals which, together with the Reporter's Transcript of Proceedings on trial and the original exhibits, transmitted herewith, constitute the transcript of record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 4th day of August, A.D. 1954.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy

In the United States District Court for the Southern District of California, Central Division

No. 14690-HW—Civil

THE QUAKER OATS COMPANY, Plaintiff,

vs.

JOHN J. COUCH, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., February 24 and 25, 1954

Honorable Harry C. Westover, Judge Presiding.

Appearances: For the Plaintiff: George R. Maury, Esq., 3460 Wilshire Blvd., Los Angeles 5, Calif. For the Defendants W. E. McKibben, A. B. Carter, O. R. Lewis: Frank C. Nimocks, Esq., 11017 So. New St., Downey, Calif. For the Defendant Charles Geers: In Propria Persona. [1*]

Los Angeles, Feb. 24, 1954, 10:00 o'clock a.m.

The Clerk: No. 14690, HW, Civil, Quaker Oats Company vs. John J. Couch, et al.

Mr. Maury: The plaintiff is ready, your Honor.

Mr. Nimocks: The defendants McKibben, Carter and Lewis are ready.

The Court: You may proceed.

Mr. Maury: One of the defendants, Mr. Charles Geers, is appearing in propria persona. He is pres-

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

ent in court, has filed an answer in pro per. For the plaintiff I will call Mr. Geers as a witness.

CHARLES GEERS

a defendant herein, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Charles Geers.

Direct Examination

Q. (By Mr. Maury): Mr. Geers, calling your attention to the period of the months of July and August in 1952, will you state to the court what was your occupation at that time?

A. I was in the trucking business with John Couch.

Q. With John Couch? A. Yes. [3]

Q. Will you describe what you did in that trucking business?

A. I was engaged in buying poultry.

Q. What did you do with the poultry after you bought it? A. Sold it to processors.

Q. From whom did you buy the poultry?

A. From the growers.

Q. What was the arrangement between you and Mr. Couch?

A. Well, from the beginning?

Q. Just tell the court what the arrangement was.

The Court: We are not interested in any other arrangement except this purchase.

The Witness: Well, now, on these dates, it has

(Testimony of Charles Geers.)

been quite a while ago. I didn't have a copy of the answer I filed with the court. The dates I can't be sure of. The rest of my testimony I can.

Q. (By Mr. Maury): Calling your attention to this document—which I ask be marked as Plaintiff's Exhibit 1 for identification.

The Court: It may be marked Plaintiff's Exhibit 1 for identification.

The Clerk: 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Maury): I hand you Plaintiff's Exhibit 1 for identification. Does that refresh your memory as to any date? A. Does what?

Q. Does that refresh your memory as to any date? [4] A. That does, yes, sir.

Q. Is that your signature upon that check?

A. Yes, sir.

Q. Did you sign it? A. Yes, sir.

Q. Did you give it to this man, C. W. Ohlson?

A. I didn't fill it in. I signed the check.

Q. You signed the check? A. Yes.

Q. Do you know whose handwriting that is filled in in?

A. No. It must be the boy that had our truck.

Q. But it is your signature? A. Yes, sir.

Q. Did you authorize the boy that had your truck to fill it in? A. Yes.

Q. And hand it to Ohlson?

A. He was paying Ohlson that much on the sale for his turkeys, on the side.

(Testimony of Charles Geers.)

Q. On the side, what do you mean?

A. I think that same day there was a check made to Ohlson and Quaker Oats.

Mr. Maury: May this be marked as the Plaintiff's Exhibit next in order for identification?

The Court: It may be marked Plaintiff's Exhibit 2.

The Clerk: Plaintiff's Exhibit 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.) [5]

Q. (By Mr. Maury): At this time we will offer Exhibit 1, your Honor. The witness says it is his signature.

The Court: It may be received in evidence.

The Clerk: Plaintiff's Exhibit 1 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit 1.)

Q. (By Mr. Maury): Calling your attention to Plaintiff's Exhibit 2 for identification, is that also your signature at the bottom thereof?

A. Yes, sir.

Q. Did you fill that in? A. No, sir.

Q. Who did, if you know?

A. John Couch.

Q. John Couch. Did he give it to Mr. Ohlson, if you know?

Mr. Nimocks: Just a moment. I will object to that as assuming a fact not in evidence, a conclusion.

Mr. Maury: If he knows.

(Testimony of Charles Geers.)

The Court: The question is, did you give it? What is the conclusion in that?

Mr. Nimocks: He said, "Did he give it to him."

Mr. Maury: That is the question, your Honor. Did Mr. Couch give it to Mr. Ohlson, if the witness knows.

The Witness: I don't know. At that particular time we had on that same date another deal to buy some chickens, and we had two trucks and I went out there with them, Couch was there and two fellows that worked for us, and I took one truck [6] after I had made those checks and went on.

Q. Did you make out the amounts or just hand out blank signed checks?

A. No. I made that for John.

Q. And handed it to John? A. Yes.

Q. Is that true, also, of Plaintiff's Exhibit 1, you handed that to John Couch? A. Yes.

Mr. Maury: For your Honor's information, I might state Mr. Couch has departed this life and is no longer before the court. I have investigated and found no estate is pending in Riverside, the county of his residence, and consequently we should now ask that the action be abated as to him. He was killed in an automobile accident.

Q. To continue, what did you receive in exchange for that check?

A. A number of turkeys. I don't remember the exact amounts.

Q. How many, approximately?

A. I don't remember. A truckload.

(Testimony of Charles Geers.)

Mr. Maury: We offer now Plaintiff's Exhibit 2 in evidence, your Honor.

The Court: It may be received.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

The Court: Do you know where these turkeys were that were purchased by Exhibits 1 and 2?

The Witness: The location of them? [7]

The Court: The location of the turkeys when they were bought.

The Witness: They were near Perris.

The Court: In Riverside County?

The Witness: Yes, sir.

Q. (By Mr. Maury): Were they on the ranch of Mr. Ohlson, the payee named on those checks?

A. Yes, sir. I assume it is his ranch.

Q. Did you see the turkeys? A. Yes.

Q. You were there and saw the turkeys?

A. Yes, sir.

Q. Who else was there at the time you had that transaction? A. Mr. Ohlson.

Q. Did you talk with Mr. Ohlson about buying turkeys?

A. Yes. I talked to Bill Brooks, the Quaker Oats representative, to begin with.

Q. Did you talk with Mr. Ohlson at the time you bought the turkeys? A. Yes, sir.

Q. Was anybody else there?

A. John Couch.

Q. Who else?

(Testimony of Charles Geers.)

A. A colored boy, I believe that worked for us.

Q. Tell us what was said at that time.

Mr. Nimocks: I shall object to that question insofar as it applies to the defendants McKibben, Carter and Lewis; hearsay.

Mr. Maury: That objection is well taken.

The Court: Oh, the objection is overruled. There is no jury here and the court will take into consideration the hearsay testimony. It only applies to certain defendants.

Mr. Nimocks: Thank you.

The Witness: The question again?

(Question read.)

The Witness: I couldn't tell you word for word.

Q. (By Mr. Maury): Of course, but will you give us the substance of it?

A. Well, now, I think that is the second time we bought turkeys from Mr. Ohlson. I am not sure. We bought from him two different times.

Q. Was it on the occasion of the giving of these checks?

A. Was that the first time or the second?

Q. I don't know.

A. I don't recall, either. The conversation would be much different the second time you dealt with a man.

Q. Were these checks ever paid, Plaintiff's Exhibits 1 and 2?

A. Not to my knowledge. [9]

Q. After you got these turkeys, what did you

(Testimony of Charles Geers.)

do with those turkeys that you got from the Ohlson ranch?

A. I don't recall who they were sold to.

Q. What did you do with them is the question, sir?

A. We hauled them to market and sold them.

Q. To what market?

A. To Los Angeles.

Q. You hauled them all the way to Los Angeles?

A. I don't remember who each particular load went to.

Q. You don't remember, but you know you did haul them to Los Angeles? A. Yes.

Q. And you did sell them?

A. I didn't personally.

Q. Who did? A. John.

Q. Couch sold them? A. Yes.

Mr. Maury: May this be marked Plaintiff's Exhibit next in order for identification?

The Court: It may be marked Plaintiff's Exhibit 3 for identification.

The Clerk: Plaintiff's Exhibit 3 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Maury): Calling your attention to this check, Mr. Geers, is this signed by you, Plaintiff's Exhibit 3 for identification? A. Yes.

Q. Who filled in the body of that?

A. I did.

Q. It is all in your handwriting?

(Testimony of Charles Geers.)

A. Yes.

Q. In the upper left-hand corner is the inscription there also in your handwriting? A. Yes.

Q. Which reads, "Park Avenue Poultry," and gives an address and phone? A. Yes.

Mr. Maury: We offer this in evidence as Plaintiff's Exhibit 3.

The Court: It may be received in evidence as Plaintiff's Exhibit 3.

The Clerk: Plaintiff's Exhibit 3 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 3.)

Mr. Maury: May this be marked as Plaintiff's Exhibit 4 for identification?

The Court: It may be marked Plaintiff's Exhibit 4 for identification. [11]

(The document referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Maury): Calling your attention to Plaintiff's Exhibit 4 for identification, is that your signature at the bottom of it? A. No.

Q. It is not your signature? A. No.

Q. Who wrote it, do you know?

A. I have no idea.

Q. No idea? A. It is not mine.

Q. Is the handwriting in the upper portion of the check yours?

A. No. I was not even present or even, I don't think, still connected.

(Testimony of Charles Geers.)

Mr. Nimocks: Excuse me, counsel. What was the amount of the check?

Mr. Maury: August 13, 1952, \$1,365.90.

Q. You state that was not given by you?

A. I am positive.

Q. And that no part of the handwriting on that check is yours? A. No.

Q. Do you know whether John Couch wrote your name there? [12]

A. I have a good comparison here. That is the reason I dug these old ones out and brought them along.

Mr. Maury: May the record show that the witness has handed me a check identical, on the same bank, as the one which is Plaintiff's Exhibit 4 for identification, with the signature of John J. Couch. I would like to offer that as an exemplar of the signature of Couch, your Honor, together with Plaintiff's Exhibit 4.

The Witness: Here is another one.

Mr. Maury: The witness has handed me another.

The Court: You mean to say you want both checks put together?

Mr. Maury: I would like to offer them in evidence in conjunction with Plaintiff's Exhibit 4 so that the court may consider them.

The Court: Suppose we mark that 4-A?

Mr. Maury: Thank you. Then that will be very clear.

The Clerk: Plaintiff's Exhibit 4-A for identification.

(Testimony of Charles Geers.)

(The document referred to was marked Plaintiff's Exhibit 4-A for identification.)

Mr. Maury: Now, may this be marked Plaintiff's Exhibit 5 for identification?

The Court: Plaintiff's Exhibit 5 for identification.

The Clerk: 5 for identification. [13]

(The document referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Maury): Calling your attention to Plaintiff's Exhibit 5 for identification, is that your signature at the bottom of that? A. Yes.

Q. Is the whole check in your handwriting?

A. Yes.

Mr. Maury: We offer 5 in evidence, your Honor.

The Court: It may be received.

Mr. Nimocks: What is the amount?

The Clerk: Plaintiff's Exhibit 5 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 5.)

Mr. Maury: \$1,490.60.

Q. Calling your attention now to Plaintiff's Exhibit 3, were you present when that was handed to the payee, McVicker, named therein?

A. I believe I was, yes, sir.

Q. Who else was present?

A. John Couch.

Q. Was anybody else present at that time?

A. Possibly one or two fellows that work for him.

Q. But that was all?

(Testimony of Charles Geers.)

A. To my knowledge, yes. [14]

Q. Will you state to the court what was said by you and by Mr. Couch and by Mr. McVicker?

Mr. Nimocks: I make the same objection on all these.

The Court: Same objection and same ruling.

Q. (By Mr. Maury): What is the answer, Mr. Witness?

A. What was said by Mr. Couch, myself, and Mr. McVicker, is that the question?

Q. Yes, that's right.

A. Well, we talked of buying the turkeys, and John made a bargain with him, and he bought them.

Q. Do you know how many turkeys?

A. No, sir, I don't.

Q. Do you have any record of weights that you purchased?

A. John had every record we had, the whole works.

Q. On any of these occasions?

A. He did it all. I have been unable to find that. His attorney doesn't have it.

Q. Were you and he partners?

A. In a sense of the word. We had a working agreement on the sharing of profits, of which there were evidently none.

The Court: How about the sharing of the losses?

The Witness: I don't know. Well, I didn't have any set—at the time I was working for him, I drew around \$75 a week. We were supposed to share and share alike. How come me to be [15] in with him

(Testimony of Charles Geers.)

to begin with, he was about to lose one of his trucks, and I had a good job and good credit, so he wanted me to take the truck over, which I did, and then the used car business was slow, wasn't making too much, putting in a lot of hours, and I didn't know what the turkey business was until I got in it. I found there was a lot of work in it.

Q. (By Mr. Maury): This bank account on which you signed these checks, was that a joint bank account of you and Mr. Couch?

A. It was joint in that I had the privilege of checking on it.

Q. And so did he?

A. It was his account. He opened the account. He had a bank account with one of the branches of, I think, Security National, and he opened an account down there. He told me at the time he opened it that he was going to deposit \$4,000 in the account to buy with, and if I would go to work for him or with him, however you want to put it, that he would handle all the marketing and whatnot, because he understood that end of it, he knew where to sell, if I would go out and tend to the trucking end of it and the buying, which I found myself doing more and more. I think you understand the reason now for all that.

Q. Let's get back to the time you had this transaction evidenced by the August 8 check. [16]

A. August 8?

Q. Yes. Tell us all that you can remember about that transaction at that time.

(Testimony of Charles Geers.)

A. Well, I think these turkeys that we were buying were bought prior to August 8. I think they were bought possibly the day or two days ahead of that time, because the checks on these things, according to Couch's instructions, all the money, he wanted me to date the checks ahead a day or two.

Q. And you did date them ahead a day or two?

A. Yes, I think so.

Q. That would be about August 6 that you took possession of the turkeys?

A. 6th or 7th. Might have been on the 8th. I don't remember.

Q. You immediately put them in trucks?

A. Yes, sir.

Q. And took them away? A. Yes.

Q. To the Los Angeles market? A. Yes.

Q. And sold them as quickly as you could, is that true? A. Yes.

Q. You don't know how many turkeys you received in exchange for Plaintiff's Exhibit 3? [17]

A. No, sir, I don't.

The Court: May I ask a question?

Mr. Maury: Yes.

The Court: You say Couch said he was going to put \$4,000 in this bank account. Did you put any money in the account?

The Witness: No, none whatsoever.

The Court: Did you go down to the bank and open up the account with Couch?

The Witness: No, sir.

The Court: Did Couch have that bank account

(Testimony of Charles Geers.)

before you went into business with him, so far as you know?

The Witness: No, not that one. He closed out his account at one of the Security banks.

The Court: This was a new account, was it?

The Witness: Yes, sir. About, oh, I think a week or more after he had opened this account, the only money I had invested in the deal, I borrowed \$500 and bought the secondhand truck.

The Court: You didn't go down to the bank when the account was opened up?

The Witness: No, sir.

The Court: You evidently had a right to draw upon the account. Where did you sign the signature card?

The Witness: I signed on the second line. He went down and made out a new signature card on the account. [18]

The Court: You didn't go down to the bank to sign it?

The Witness: Yes, sir.

The Court: You did?

The Witness: Yes, sir.

The Court: And you signed the signature card?

The Witness: Yes, sir.

The Court: Did you do anything else at the bank besides sign the signature card?

The Witness: No, sir, nothing.

Q. (By Mr. Maury): Do you know whether that was a joint signature card or power of attorney to you? A. I don't know.

(Testimony of Charles Geers.)

The Court: You have the signature card here, I suppose?

Mr. Maury: I have the banker here and he tells me it is over in Riverside in the Superior Court.

Q. On August 12 you issued this check, Exhibit 5, for \$1,490.60. Did you personally hand that to Mr. McVicker? A. I imagine I did.

Q. Was there anyone else present?

A. Well, John would always in those cases go out and help me load, so I imagine he was there.

Q. And Mr. McVicker, of course, was there? Was anyone else present?

A. Well, we always had at least one or two fellows help us. [19]

Q. But nobody else was there?

A. One time he had one of his neighbors help.

Q. Mr. McVicker had a neighbor help?

A. Yes.

Q. Then on any of these occasions was anybody present except Mr. McVicker and possibly a neighbor or helper, and you and Mr. Couch and your helper?

A. You mean a representative of Quaker Oats?

Q. I am asking about anybody.

A. Well, now, this has been two years ago, almost.

The Court: May I ask a question?

Mr. Maury: Surely, sir.

The Court: I notice these checks are made out, at least some of them are made out jointly to not only the seller, but the Quaker Oats Company. Did

(Testimony of Charles Geers.)

you know when you made out these checks that the Quaker Oats Company claimed a lien on the turkeys?

The Witness: Yes, sir. That is how come us to get a lead on where to buy them. The Quaker Oats representative approached us at the scales in Perris, a fellow by the name of Bill Brooks, and asked us to buy these turkeys.

Q. (By Mr. Maury): When was that?

A. That was before we ever dealt with Ohlson.

Q. When was that?

A. I couldn't tell you. I couldn't tell you whether May, [20] June, July, or August.

Q. Was it the year of 1952? A. Yes.

Q. Where?

A. At Perris at the scales.

Q. At the scales there? A. Yes.

Q. How did you know he was Mr. Brooks?

A. He gave me his card.

Q. How long before these transactions was it?

The Court: What did you say his name was?

The Witness: Bill Brooks, William Brooks.

The Court: You say he gave you a card?

The Witness: Yes.

The Court: Have you got the card?

The Witness: No, sir.

The Court: What did the card have on it?

The Witness: He was field service representative or something for Quaker Oats.

The Court: You are sure it said Quaker Oats Company on it?

(Testimony of Charles Geers.)

The Witness: Yes.

The Court: All right.

Q. (By Mr. Maury): When was it with reference to these transactions? [21]

A. Well, now, I can't remember. We had two dealings with Ohlson. I believe we bought hen turkeys first or possibly tom turkeys, or vice versa, one way or the other, and probably two or three weeks or something like that later before we bought the last bunch from him. That is the best of my knowledge.

Q. In other words, you had this conversation with Mr. Brooks about two or three weeks before you bought these turkeys?

A. No. The first time we bought from Ohlson or the first time we went to talk to him, we had had a conversation with Brooks prior to that about a week.

Q. What did Brooks say and what did you say in this conversation?

A. He asked, in fact, I don't think John was there, I am not sure, but he asked me—we had fryers we were hauling and we went in there to weigh, and he asked who we worked for or who we represented. I told him John Couch.

He asked if we were buying any turkeys and what kind of price we were paying. There was quite a hassle to get an extra penny or half penny, and I told him he would have to talk to John, and he said that won't be necessary. He said, "I have got a couple of bunches in this area and if you

(Testimony of Charles Geers.)

will go to those fellows and tell them you talked to me," or something, I have forgotten exactly what it was, but he stated they had them [22] to sell.

The Court: Where did he tell you to go?

The Witness: He told us where the farmers' places was.

The Court: Who did he tell you to see?

The Witness: Ohlson. Ohlson, I think, sent us to see McVicker.

Q. (By Mr. Maury): Did he ever tell you Ohlson or McVicker or the Quaker Oats Company would accept bad checks in payment?

A. I don't believe we went into that.

Q. Didn't discuss that? A. No.

Q. Didn't discuss payment at all, did you?

A. I don't remember exactly whether we did or not, sir. I think basically you have to deal with the farmer, anyway.

Q. Tell us what you remember of what happened. A. When?

Q. As well as you can remember. Was anything said by you or Brooks respecting payment?

Q. You think he mentioned that they were paid by check?

A. I think he mentioned that they were paid by check?

A. Okay. I am assuming. I am thinking to the best of my knowledge. You said, "the best you can remember."

Q. I want the best you can remember.

A. I can say I don't remember then. [23]

(Testimony of Charles Geers.)

Q. You don't remember? A. No.

Q. You don't remember anything Mr. Brooks said about payment, is that right?

A. I don't remember.

Q. You don't remember? A. That's right.

Q. I am going to ask you, was anything said about payment that you remember?

A. I don't recall of even discussing payment with him.

The Court: Just a minute. You said something a while ago that Brooks said they had some turkeys. What did Brooks actually say about Quaker Oats?

The Witness: I believe that is the way he put it.

The Court: Did he say Quaker Oats Company?

The Witness: He said—I don't know how he did say it, clients, or one of their customers had some turkeys that were ready for market.

The Court: One of their customers had some turkeys?

The Witness: Yes.

The Court: Did he say anything about the Quaker Oats Company having a bill against the turkeys?

The Witness: He said they had furnished the feed for them. I think that is pretty common practice in the feed business. I don't know too much about it. [24]

The Court: When you got down to buy these turkeys, who told you to put Quaker Oats Company's name on the check?

(Testimony of Charles Geers.)

The Witness: I don't recall whether it was him or whether it was the grower.

The Court: Brooks wasn't present at the time the sale was made?

The Witness: No, sir, he was not. I believe it was the grower.

The Court: The grower told you to put the Quaker Oats Company's name on the check?

The Witness: I believe it was, yes.

The Court: When you made these checks out, you knew that the Quaker Oats Company had some kind of a claim on the turkeys or the money representing the turkeys?

The Witness: Yes, I assumed that they did. This was all completely new to me. I had never been in this business and I hope I am never unfortunate to get in it again.

Q. (By Mr. Maury): Have you ever made any of these checks which you signed good?

A. I think you have one that was cleared.

Q. I am talking about ones that are in evidence before you.

A. No, sir.

Q. Exhibits 1, 2, 3, and 5.

A. No, sir.

Q. You knew they were all dishonored at the bank, did [25] you not?

A. I did not know it until after I had quit Couch.

Q. You haven't paid anything on account, have you?

A. No, sir.

Q. After you put these birds aboard the truck,

(Testimony of Charles Geers.)

do you remember what market you went to in Los Angeles to sell them?

A. I think I only went one time.

Q. Where was that one that you went to that one time, sir?

A. Well, we were hauling other birds at that time besides these particular ones, so I don't know where they went.

Q. You don't know where they went?

A. I know they were sold.

Q. Did you receive the money that they were sold for?

A. No, sir.

Q. Who did?

A. I think Mr. Couch, John, collected all the money.

Q. Was it put in this bank account?

A. I don't know whether it was or not.

The Court: May I ask a question?

Mr. Maury: Surely.

The Court: You took the turkeys down and sold them. When you delivered the turkeys——

The Witness: I think one time I went along.

The Court: When you delivered the turkeys, what did the [26] buyer give you? Didn't he give you a check or cash or money for them?

The Witness: Not to me, no, sir. I think one time I was paid for a loan.

The Court: Did Couch go along with you when you took the turkeys down to sell?

The Witness: I didn't go up there. I would

(Testimony of Charles Geers.)

load and he would go with the truck or send this Mexican boy.

The Court: Only one time you went?

The Witness: I think only once.

The Court: What happened when you went there the one time?

The Witness: I didn't collect the money.

The Court: Who did?

The Witness: Couch would drop by later and pick it up.

The Court: You mean to say you just delivered the turkeys and then left?

The Witness: Yes.

Mr. Maury: May the record show counsel for the defendants McKibben, Carter and Lewis has handed me a Downey Rabbit & Poultry Company check, No. 26097.

Mr. Nimocks: Carter and McKibben only.

Mr. Maury: Yes. Which is dated August 8, 1952.

Q. I will show you the back of it, Mr. Geers. Is that your signature on the back of it? [27]

A. Yes, that is.

Mr. Maury: I offer this in evidence, your Honor.

The Court: It may be received in evidence as Plaintiff's Exhibit 6.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 6.)

The Witness: Could I look at that again, please?

(Testimony of Charles Geers.)

Q. Surely. Plaintiff's Exhibit 6. You may look at it. Did you receive that check from the Downey Rabbit & Poultry Company on August 8, 1952, the date which it bears? A. Did I what?

Q. Did you receive that?

A. I evidently did. I endorsed it. I don't remember whether I put it in the bank or not. I see that it went in.

Q. Who did you and Couch usually sell the birds to?

A. We sold some to Orville, we sold some to Mack, and some to——

Q. Who is Orville? A. Orville Lewis.

Q. And who is Mack?

A. McKibben. May I ask one of them something? I don't recall the name of the other. What is the other company downtown——

Q. There were only three processors you sold poultry to? [28]

A. That was the main three we sold to, yes, sir. There were a couple of others. Beech.

Mr. Maury: You may cross examine, counsel, or examine, I should say, because I have been cross examining the defendant.

The Court: You don't remember what you did with this check, Plaintiff's Exhibit 6, after you got it? It is made out to you.

The Witness: It is endorsed, your Honor. There is no second endorsement, so it must have been deposited.

The Court: You didn't cash it?

(Testimony of Charles Geers.)

The Witness: No, I did not.

The Court: If it was deposited——

The Witness: It was deposited.

The Court: Who deposited it, do you know?

The Witness: Either Couch or myself.

The Court: Did you go in the bank and make the deposit?

The Witness: I might have in that case. It wasn't common practice for me to.

The Court: All right.

The Witness: In most cases I did not know the prices John was getting for the stuff.

The Court: All right. [29]

Cross Examination

Q. (By Mr. Nimocks): Mr. Geers, were you a licensed dealer under the Agricultural Code of the State of California at that time?

A. They decided in Riverside we weren't.

Q. What about Mr. Couch?

A. They decided he wasn't, either.

Q. On these deposits in the bank accounts, did you make deposits as well as Mr. Couch?

A. Oh, about, I would say possibly three occasions or maybe four in all the time that we were together.

Q. You were buying poultry from other growers at that time, were you not? A. Yes.

Q. I think you stated in previous testimony you thought there was one check that cleared, is that not correct? A. Yes, sir.

(Testimony of Charles Geers.)

Q. I hand you a check dated August 7, 1952, on the Norwalk branch, Bank of America, made out to C. W. Ohlson and Quaker Oats, and ask you if that is your signature. A. Yes, sir.

Q. That check was paid by the Bank of America on what date? A. 8/19/52.

Q. That bears the endorsement of Quaker Oats as well as [30] C. W. Ohlson? A. Yes.

Q. What was that?

A. C. W. Ohlson, pay to the Bank of America. That was for turkeys.

Q. Any other kind of poultry?

A. No. We never bought anything else.

Mr. Nimocks: May this be offered as Defendants' Exhibit first in order?

The Court: It may be received.

The Clerk: Defendants McKibben, Carter and Lewis Exhibit A in evidence.

(The document referred to was received in evidence and marked as Defendants' Exhibit A.)

Q. (By Mr. Nimocks): Now, Mr. Geers, did you buy other kinds of poultry besides turkeys?

A. Yes, sir.

Q. Did you buy from other growers than Ohlson and McVicker? A. Yes.

Q. Did you have occasion to make out checks payable to the growers and other milling companies or feed companies? A. Yes, sir.

Q. Among them were whom, do you recall?

A. I think that check I gave them for com-

(Testimony of Charles Geers.)

parison of signatures [31] there, I think that you will find that check was a joint one.

The Court: Exhibit 4-A?

The Clerk: 4-A, yes, sir.

Q. (By Mr. Nimocks): Check of John Couch. Who is on that?

A. A. Graves and Albers Milling Company.

Q. No. It says Purina.

A. Well, Purina, one of them. Here is another one, A. Graves and Ralston-Purina Company.

Q. Was that a common practice in the trade, Mr. Geers, to your knowledge?

Mr. Maury: To which we object. The witness has testified he was a brand newcomer in the trade.

The Court: When did you first start in this poultry racket?

The Witness: You put it very aptly. If you have a copy of the answer there, the dates were fresher. I had an attorney refresh my memory.

The Court: Don't you remember?

The Witness: It was in March or April 1952, I think.

The Court: March or April 1952?

The Witness: Yes, sir.

The Court: Then you went out buying poultry and rabbits and turkeys, is that right?

The Witness: Just poultry and turkeys. [32]

The Court: How much time did you give to the buying of poultry and turkeys?

The Witness: Well, we worked about day and night, I guess.

(Testimony of Charles Geers.)

The Court: Constantly from April to August?

The Witness: We worked pretty hard, yes, sir.

The Court: How many loads would you buy in the course of a week?

The Witness: It all depended. We had a poultry market, too, where we were selling dressed poultry to the retailers.

The Court: You said you drove a truck and went out and made the purchases with the truck?

The Witness: We did.

The Court: How many times a week did you go out?

The Witness: Sometimes you would go three and sometimes you would go once. Sometimes you would go every night for three or four nights in a row.

The Court: You did that constantly from April or May until August?

The Witness: Yes, sir.

The Court: How many growers did you contact during that period?

The Witness: Deal with?

The Court: Yes, deal with.

The Witness: We had this Mr. Graves up at Lancaster we [33] dealt with. We had two or three smaller growers we bought chickens from quite regularly. We bought turkeys from a fellow by the name of Smith—I would say probably we bought from 15 to 20 people.

The Court: Did you have any other people in

(Testimony of Charles Geers.)

the Perris Valley other than the parties represented on these checks?

The Witness: Yes. We bought from a man by the name of Smith.

The Court: Would you keep your voice up? This is not a private conversation.

The Witness: We bought from a man by the name of Smith.

The Court: In all these transactions, did you pay for any of the poultry or the turkeys in any way except by check?

The Witness: No, sir.

The Court: Never paid cash?

The Witness: No, sir.

The Court: Always gave checks?

The Witness: Yes, sir.

The Court: Did you give checks at any time to anybody other than the grower?

The Witness: Yes, sir. I have one right here.

The Court: The grower and who?

The Witness: Ralston-Purina Company. If I had one of our old blank checks, I mean the cancelled checks, I think in most all cases where there was a lien on the poultry, we did that. [34] I did not know it was for that purpose.

The Court: How did you know there was a lien on the poultry?

The Witness: Most of the growers would tell you.

The Court: Did they tell you to make the check to themselves and the feed company?

(Testimony of Charles Geers.)

The Witness: Yes, sir.

The Court: What was the question now?

Mr. Nimocks: I think he has answered it now on the basis of the court's examination. You brought out the information I wanted.

Q. On approximately how many occasions per week or per month did you take this poultry or turkeys to market, Mr. Geers?

The Court: Just a minute. This witness testified he didn't deliver the poultry or turkeys. Did you say to the market?

Q. (By Mr. Nimocks): Deliver to the buyer, the buyer from you.

The Court: This witness said he didn't do it, that Couch made the deliveries.

The Witness: I think only once during this particular time, your Honor.

The Court: You mean during August? [35]

The Witness: I think only once during this McVicker deal. I misunderstood that part of it. I took poultry more than one time.

Q. (By Mr. Nimocks): Who did the bulk of the hauling of the poultry to the market?

A. I would say it was about evenly split up. In most cases, we went together.

Q. As far as these transactions are concerned here, you had only one time in which you were present at the delivery?

A. I think that is correct, yes.

Q. How were these funds handled? Who handled them so far as putting them in the bank or

(Testimony of Charles Geers.)

whatever disposition was made of the funds you received?

A. I know where that one went you have in evidence. It went in the bank.

Q. That was the same bank account on which the checks were that you drew? A. Yes.

The Court: May I ask another question?

Mr. Nimocks: Certainly.

The Court: You testified a little while ago about making deliveries and collecting the money.

The Witness: Yes, sir.

The Court: Did you mean that you were restricted to this period around August, or was that during the entire period? [36]

The Witness: I don't suppose I collected in all the time we were together over four times or five.

The Court: The money you collected, what did you do with it?

The Witness: I deposited it in the bank.

The Court: Other than these four or five times?

The Witness: There is one instance when I didn't deposit a check. The check was in the amount of \$400. I believe it was from Mr. McKibben. The reason for that was I have a friend in the Citizens Bank at Riverside, and John wrote me a check for \$400. I took the check in, and even though I didn't have an account there, this fellow is assistant cashier in the bank, so he put an O.K. on it, and I went over to the teller and he O.K.'d and he gave me the cash, and some time later he called me up, and it bounced high as a kite, and I had

(Testimony of Charles Geers.)

to scrape up \$400 to make it good. I think Mack owed us some money, and I came down and his girl wrote a check for \$400, and I think you will find that during the period there.

Q. (By Mr. Nimocks): You have stated, I think, Mr. Geers, you made sales to the Downey Rabbit and Poultry Company and to Orville Lewis and Steinman—— A. Steinberg.

Q. There were a couple of others, you said?

A. One time, I don't recall what, we sold them, John [37] had a friend down at the beach that owns, I think the name is Manor Poultry.

Q. Where is the beach?

A. I don't know where it is. Oh, yes, Redondo Beach.

Q. Did you ever make any sales to Simmons?

A. Yes.

Q. Where was he located?

A. He is over by Arcadia-Monrovia section.

Q. Did you ever make any other sales in Los Angeles County?

A. Not that I recall, no.

Q. Did you ever make any sales in Riverside County?

A. Not except through our retail store that I know of.

Q. Any other place outside of Riverside or Los Angeles County?

A. John used to haul some poultry to San Diego or Tijuana. What he did with that, I don't know.

(Testimony of Charles Geers.)

Q. Do you recall whether it was to more than one retailer or processor down there?

A. No, I don't.

Q. In other words, then, is that about five or six sources you have sold, is that correct?

A. Yes.

Mr. Nimocks: I think I have nothing further, counsel. [38]

Redirect Examination

Q. (By Mr. Maury): I would like to have you explain to the Court what records of purchases, growers you kept at that time.

A. He kept them in a regular, I think standardized form most all truckers used.

Q. What was on them?

A. It showed the amounts and the weights, who they were purchased from.

Q. What records were kept when they were sold?

A. He handled every bit of it. The ones I have delivered, I didn't and never collected a penny or anything else. Some of them, they evidently grade them and from the total poundage you didn't get paid as much money for them as you did some of the others. John would just say, "Take them in and drop them off. I will go in and settle with them." I don't know what records he kept.

The Court: May I ask another question? Who kept the books and records?

The Witness: He did.

(Testimony of Charles Geers.)

The Court: Did you have anything to do with them at all?

The Witness: No, sir.

Q. (By Mr. Maury): Calling your attention now to the Plaintiff's Exhibit 3 in evidence, dated August 8, 1952, and [39] the Plaintiff's Exhibit 6 in evidence, dated August 8, 1952, looking at those two, can you remember whether or not Plaintiff's Exhibit No. 3, which you gave to McVicker, pertained to the same turkeys that Plaintiff's Exhibit No. 6 pertained to that you sold to Downey Rabbit and Poultry Company?

A. Well, according to the date on the two checks, it would appear that they did.

Q. I am sorry, I can't hear.

A. I say due to the dates on the checks, it appears that they did.

Q. What is your recollection, sir? Isn't it true you bought turkeys from Ohlson for the first check and sold them to Downey Rabbit and Poultry Supply and received the second check the same day?

A. Yes; apparently.

Q. The same turkeys? A. Yes.

Q. What is that?

A. Yes. That is apparent to me by looking at these. I have no recollection of that.

Q. You do recollect taking a set of turkeys to Downey Rabbit and Poultry Company, Downey?

A. This check could have been issued for something they bought a week before that. I don't know.

(Testimony of Charles Geers.)

Mr. Maury: Will your Honor instruct the witness to answer the question?

The Court: Answer the question if you can. If you don't remember, you can say, "I don't remember," or if you want to, you can answer the question and explain the answer.

The Witness: That is what I am trying to do.

The Court: What is the question?

Q. (By Mr. Maury): Do you remember taking one load of turkeys to the Downey Poultry and Rabbit Company?

A. On August 8, I don't remember.

Q. On or about?

A. On or about, yes.

Q. On or about August 8?

A. Yes, I evidently did.

Q. From these two checks, you assume that this is the load you took, is that right?

A. That is what I assume, yes.

Q. But you have no independent recollection of that particular load?

A. Yes, that's right.

Q. Did you ever take another load of turkeys to Downey Rabbit and Poultry Company?

A. I don't recall whether I did or not.

Q. Did you ever take a load of turkeys to Thrifty Poultry Company? [41]

A. I don't remember exactly whether I did or John.

Q. Were you with him at the time?

A. I have been with him when we unloaded

(Testimony of Charles Geers.)

turkeys, maybe not a whole load, but a partial load.

Q. Was it about this same time in August, 1952 that you took a load or a partial load to the place of the fellow you call Orville?

A. I imagine. I don't know how many we brought there.

Q. Whose place is Orville's? A. Thrifty.

Q. And that is Downey Rabbit and Poultry Company? A. Yes.

Q. Who have you talked to about this case since you were first served with process besides your lawyer? A. Who have I talked to?

Q. Yes. A. I don't know.

Q. Have you talked to Mr. Lewis?

A. I have seen Mr. Lewis about twice, I think. I saw him at John's funeral and I saw him once at John's house the night after he passed away. I saw him here in the hallway, I believe, the last time we were up, and this morning. I have seen him about four times.

Q. Have you seen Mr. McKibben?

A. I think I have seen Mac once since then.

Q. Mr. Carter? A. Mr. Carter?

Q. Mr. McKibben's partner.

A. I wouldn't know him.

Q. Have you talked about this case with Mr. Nimocks? A. No.

Q. You have not? A. With whom?

Q. The attorney for these two? A. No.

Q. You have not? A. No.

(Testimony of Charles Geers.)

Q. As to the Ohlson turkeys, which transactions are evidenced by Plaintiff's Exhibit No. 1 for \$600, as to that Exhibit No. 1, I want to get it absolutely clear if you have any recollection of that transaction at all.

A. This particular check here?

Q. That's right.

A. Yes, I do.

Q. Have you told us everything about that transaction that you know?

A. I believe John filled in the amount and the date, who it is to, and I wrote the check, and it is quite evident I didn't fill in the amount.

Q. Were you present at the time the check was handed [43] to Mr. Ohlson?

A. No, I was not. I was present at the time we loaded the turkeys and then I left.

Q. Where did those turkeys go, if you know?

A. I don't know.

Q. Where did you take them? You were present.

A. I had another truck.

Q. You had another truck?

A. Yes. From the grower's place I had to go to the scale. I remember him saying he needed some money and to deduct it off the weight of the turkeys and give him that much money.

Mr. Nimocks: I'm sorry. I couldn't hear.

The Witness: He said he needed some extra money and he didn't know he was going to come out and settle with Quaker Oats, so to give him that much extra.

Q. (By Mr. Maury): The grower told you to make this check out?

(Testimony of Charles Geers.)

A. Make another check for \$600, he said.

Q. Without Quaker Oats name on it?

A. He said make it for that amount.

Q. Was that at the request of the grower?

A. I have no idea of the conversation after I left. John said he wanted another check.

Q. You gave him the other check? [44]

A. Yes.

The Court: Mr. Maury, it is after 11:00 o'clock and we usually take a recess at this time.

Mr. Maury: Surely.

The Court: While you are thinking up your next question, we will take our morning recess. We will now recess until twenty minutes after 11:00.

(Morning recess.)

The Court: Do you have any other questions?

Mr. Maury: I just wanted to get one thing straight.

Q. You did take one load of turkeys to the Thrifty Poultry, is that right, that is, at or about this month of August, 1952?

A. I think we might have taken a partial load. I don't remember. I think we did, though.

Q. Any more than that?

A. No, sir, I don't think so. I know one of those loads we sold in two different places. I don't remember where the second place was, but we sold one load to them or a part of a load.

Q. That was from the turkeys you got from the Ohlson place or McVicker?

(Testimony of Charles Geers.)

A. I think so, yes.

Mr. Maury: That's all.

Mr. Nimocks: I have just a few questions, your Honor. [45]

Recross Examination

Q. (By Mr. Nimocks): Referring to Exhibits 3 and 6——

May I find out just which ones these are?

The Clerk: 3 is dated August 8. 6 is dated August 8.

Q. (By Mr. Nimocks): Referring, also, to Defendants' Exhibit A, the check which you gave to Ohlson and Quaker Oats in the amount of \$2,611.25, dated August 7, is it possible, Mr. Geers, some of that poultry or turkeys were delivered to Downey Rabbit and Poultry on that day or the next day, the 8th? A. It is possible, yes.

Q. The check I am referring to is the one which cleared in the amount of \$2,611. Did you ever break up these loads in any way before you delivered them?

A. Yes, sometimes we did. Sometimes we kept some out for our retail store.

Q. When you say you kept them out, where did you store them or where did you have them at that time?

A. Down at a place out there. He had hold in pens for several thousand birds, not turkeys, but I mean several thousand chickens or several hundred turkeys at his home.

(Testimony of Charles Geers.)

Q. Did you ever take some of these and keep them in there?

A. We used to go by and put off twenty-five or thirty [46] or something. We had some freezers and also a refrigerator box in the store. We would go by and drop them off, or if we had too many on hand, we would load some onto another load.

Q. Is it possible some of the loads you delivered in Los Angeles County were comprised partly of turkeys in that pen or other poultry?

A. Oh, yes.

Q. How often would that occur, Mr. Geers?

A. I couldn't say, one, two, three, four times, but I mean it was a fairly common occurrence.

Q. Was it your practice to keep some of the farmers' turkeys or other kind of stock in these pens all the time?

A. Yes, some fryers, turkeys and hens.

Q. And then you would use them to fill out a load?

A. Yes, if we had a short load.

Q. Did you buy any B turkeys?

A. Well, that is the part I didn't understand about the business. That is the reason John would usually square up with people that were buying them, because I didn't understand the grading of them, and the times I did go, in most every case except, I think, this once or twice, possibly one time I went to Florence Poultry, I believe I went down there one time by myself, that is the reason I think he had the deal all arranged before he would go in with them, I mean the fellow he was taking them

(Testimony of Charles Geers.)

to knew they were on their [47] way and depended on them.

Q. Within a week or two weeks prior to this first purchase from Ohlson, did you purchase turkeys or other kind of poultry from any other grower in that area?

A. Well, I don't remember.

Q. What about during the time covering the purchase from Ohlson and McVicker?

A. During the time we were buying from them, did we buy any other in that area?

Q. Yes, did you buy any turkeys anywhere that you resold in that area other than these?

A. Let me think. I don't recall.

Mr. Nimocks: I believe that's all, your Honor.

The Court: May I ask a question? This Exhibit A, which is a check dated August 7, 1952, made payable to C. W. Ohlson and Quaker Oats Company, was this the first check that you gave to Mr. Ohlson, do you remember?

The Witness: No, sir, I don't remember whether it was the first one or not.

The Court: This is August 7th. Did you buy anything from Mr. Ohlson before August 7th?

The Witness: I tell you, I would never have got hold of that check if it hadn't been for——

The Court: But I am not interested in that. I am asking you your remembrance, whether or not before August [48] 7th you bought anything from Mr. Ohlson.

(Testimony of Charles Geers.)

The Witness: I couldn't say yes or no honestly to that question.

The Court: You don't remember?

The Witness: No, sir.

The Court: All right.

Redirect Examination

Q. (By Mr. Maury): When you would take on a few turkeys from Couch's pen, twenty-five or thirty would be the maximum in any of these deals?

A. We would in most cases fill out a load.

Q. How many in a load?

A. I don't recall how many the truck would handle.

Q. In the hundreds, thousands, or how?

A. Hundreds.

Q. Then to fill out a load, it would be twenty-five?

A. Yes, sometimes, if he had what he figured would be a different grade of turkey or something, one that wasn't quite up to par or one that was exceptionally good, many times he would keep a few of the holes open in the truck and put these birds in separate.

Q. But the process was that you would get a load at the grower's, is that right? [49]

A. Yes.

Q. And then come back and pick up a few?

A. Yes.

Q. And then go on to Los Angeles and sell them?

A. Yes.

(Testimony of Charles Geers.)

Q. Is that what happened with reference to the transactions as to each of these checks in evidence?

A. I wouldn't say that, no.

Q. About how many times were loads filled out or a few dropped off?

A. At that time there wasn't too much of a market for turkeys, I don't think, during that time of the year. We would have people call in to the store. We had an ad in the paper that we bought poultry and you would have people call and they had five turkeys to sell or one turkey to sell, and they would bring them down, and we didn't have a place to keep them, and we would take them to John's home, he had an acreage there, and keep them until we needed some to fill a load.

Q. But seldom more than thirty or forty?

A. That's about right.

Q. So consequently it would be a very minor fraction of the load that you took to Los Angeles either way.

A. I would say probably our truck, I don't know, would haul maybe three or four hundred.

Q. And if you put thirty or forty with them, that would be——

A. Ten or fifteen per cent.

Q. The rest of them would be the ones you got at the grower?

A. Yes.

Q. And took right on into Los Angeles?

A. Yes.

Q. Or sold to Thrifty at Downey?

A. Yes, and others.

(Testimony of Charles Geers.)

Q. And others, yes. Of the turkeys that you bought from Ohlson, how many of them did you sell to others than Thrifty or Downey?

A. We sold one load there and I don't know whether they went to Simmons or to Steinberg, to Florence Poultry.

Q. That is of the Ohlson birds?

A. I think maybe—well, of the two there. We were buying most of those right there in a relatively short period of time. I just couldn't honestly say whether any of them went to someone else or whether one load or two loads did.

Q. You couldn't honestly say? A. No.

Q. You have no recollection?

A. No, sir. [51]

Q. Isn't it true almost all of these birds went to Downey and this one fraction of a load went to Thrifty?

A. I know the one load that I evidently hauled, according to that check, went to Downey Poultry. I don't remember whether—

Q. You have already testified about this fractional load that went to Thrifty.

A. I know we took one load that had, I believe they were hen turkeys, and I don't know whether there were some chickens in the load or not.

Mr. Maury: That's all.

The Court: You may step down.

Mr. Maury: May this witness be excused. As I say, your Honor, he is also a defendant.

(Testimony of Charles Geers.)

The Witness: Your Honor, may I ask something?

The Court: Yes.

The Witness: I just went to work on a new job the first of the month and I wondered if I could be excused from coming back. This thing will evidently go into the second day.

The Court: You are a defendant in this case.

The Witness: If it goes into the second day, do I have to come back tomorrow?

The Court: I don't presume you have to be here at all. You didn't have to answer.

Mr. Maury: He was subpoenaed, your Honor.

The Court: However, it is up to you.

The Witness: I would sure like that. I mean I had a heck of a time getting away today.

Mr. Nimocks: I would prefer if he would stay the rest of the day.

The Witness: Well, the rest of the day is all right.

The Court: You make your request tonight.

The Witness: O.K.

(Witness excused.)

Mr. Maury: I will call the representative from the Bank of America.

WILLIAM LISKEY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: William Liskey.

The Clerk: How do you spell your last name?

The Witness: L-i-s-k-e-y.

Direct Examination

Q. (By Mr. Maury): What is your occupation?

A. Assistant Operations Officer, Bank of America, Norwalk Branch. [53]

Q. As such, do you have under your supervision and control the records of accounts of depositors of that bank? A. Yes, I do.

Q. Calling your attention to an account which is listed in the name of Charley Geers or John Couch, do you have the records of that account with you for the month of July and August, 1952?

A. Yes, I do.

Q. May I see them? A. Yes.

Q. Will you first explain to the Court what they are composed of and what each document is?

A. We have the records of checks and deposits with the balances for that period.

Q. That is the usual bank statement?

A. Yes, it is. This is a certified copy.

Q. How many sheets are there and for what months?

(Testimony of William Liskey.)

A. This covers from July through January 1, 1953, July 2nd of 1952 through January 1, 1953.

Q. You said they are certified copies. By that what do you mean? The originals are maintained in the office of the bank?

A. Well, the carbons of originals are maintained in the bank and these are copies, two copies of those.

Q. They are made for the purpose of bringing to court? A. That's right. [54]

Q. To your knowledge, are they true and correct copies of the originals?

A. Yes. However, I did not make these up, but I did check them.

Mr. Maury: Your Honor is familiar with the rule that national banks must keep their records intact. Do you object, counsel?

Mr. Nimocks: I have no objection.

The Court: Do you have any records showing how the account was opened?

The Witness: Well, I have the original signature card John Couch used to open his individual account, and I also have this temporary card that was used to close that out and open it in a joint tenancy for Charles Geers and John Couch, but the original signature card, they told me one of the courts has, I don't know which one. It was used in the other action two years ago. I am not familiar with that particular court action.

Mr. Maury: If your Honor please, may these be stapled together and marked as one exhibit?

(Testimony of William Liskey.)

The Court: Yes. They may be marked Plaintiff's Exhibit 7.

Mr. Maury: They are offered in evidence.

The Court: They may be received.

The Clerk: Plaintiff's Exhibit 7. [55]

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Maury): Do you have a signature card pertaining to the account?

A. This is the original signature card.

Mr. Maury: With reference to the original, may it be stipulated that the same may be photostated and the photostat——

Mr. Nimocks: It may be so stipulated.

The Court: Then it may be substituted. Such may be the stipulation.

Mr. Maury: May this be marked?

The Court: It may be marked Plaintiff's Exhibit 8 for identification.

The Clerk: 8 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Maury): Are these the signature cards of the bank containing the exemplars of signatures of John Couch and Charley Geers?

A. Yes.

Mr. Maury: We offer these in evidence, your Honor.

The Court: They may be received in evidence.

The Clerk: Plaintiff's Exhibit 8.

(Testimony of William Liskey.)

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 8.) [56]

Q. (By Mr. Maury): Does the bank keep a record of checks that are presented and drawn on its depositors which are dishonored?

A. Yes, they do.

Q. Do you have such a record of checks presented to this account which were dishonored by the bank?

A. Yes, I do, from August 5 through September 2.

Mr. Maury: May I have this document marked for identification, your Honor?

The Court: It may be marked Plaintiff's Exhibit No. 9 for identification.

The Clerk: 9 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 9 for identification.)

Q. (By Mr. Maury): Is that a record that was regularly kept by the bank?

A. This is my copy, because there are about a dozen or more copies that this came from. There are two or three sheets each day that each bookkeeper has and we have six bookkeepers, so there is quite a stack of documents.

Q. Did you personally make that up from the records of the bank?

A. Yes, I did make this myself. I went from the beginning of August to the end of September.

Q. What does the first column indicate? [57]

(Testimony of William Liskey.)

A. This is the reason for returning checks. They are all returned for not sufficient funds.

Q. The second column?

A. That indicates the maker of the check.

Q. And the third column is the amount?

A. The third column is the amount, and this is disposition, in other words, where the check has been returned to, the last branch that handled the check.

Q. That is what is known as the call number of the bank?

A. This is the A.B.A. number here, but these others are the interior numbers of our branches. These are the dates the checks were received and returned.

Q. That is, dishonored? A. That's right.

Mr. Maury: We offer this in evidence, your Honor.

Q. One thing further. Does this pertain to the account of Charles Geers and John Couch you have just identified by the other documents?

A. Yes.

The Court: It may be received.

The Clerk: Exhibit 9.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 9.)

Q. (By Mr. Maury): During the course of your work, Mr. Liskey, is it necessary for you to be familiar with the [58] various characteristics of the handwriting of the signers of various checks?

(Testimony of William Liskey.)

A. Yes, it is.

Q. How long have you been in that work?

A. Well, I have been with the bank for six and a half years.

Q. During the course of that period of time have you had to study the various characteristics of handwritings?

A. No, I have never had to study characteristics of handwriting.

Q. Have you noticed that in the course of your work? A. I have.

Q. You have familiarized yourself through your work, rather than through study?

A. That's right.

Q. Calling your attention to Plaintiff's Exhibits 4 and 4-A for identification, both of which are checks apparently drawn on your branch of the Bank of America, one of which is signed by John H. Couch and the other bears the name Charles Geers upon the signature line, can you examine those two handwritings and give us any opinion whatsoever as to whether there is any similarity between the two?

A. I would say that the C in Couch is similar to the C in Charley, and the H that is used both for John and Couch is similar to that used in Charley Geers. That is the only [59] similarity I see, except that they both slant the handwriting the same way.

Q. Would you have any opinion as to whether they were both written by the same hand or not?

(Testimony of William Liskey.)

A. Well, that isn't very much to go on. Well, I wouldn't care to say, to tell the truth. I don't know. If there were more letters, letters that you could compare, I might say one way or the other.

Mr. Maury: I think you may cross examine.

Mr. Nimocks: I have no questions.

Mr. Maury: May this witness be excused?

The Court: Before this witness is excused, I would like to call counsel's attention to something that appears in Exhibit 7. It appears that John Couch carried this account in his own name down to August 3.

Mr. Maury: Yes, sir.

The Court: That Geers had nothing to do with this account at all as far as the John Couch account is concerned.

Also, it appears that although this signature card is dated on July 2, 1952, nevertheless the balance of the John Couch account of \$498.92 was not transferred to the Couch and Geers account until August 3, 1952. The only money in that account is the money that was left in the Couch account, \$498.92. There isn't a deposit by anybody in the John Couch and Charles Geers account, not a deposit. The only thing we [60] have got here are certain checks that were paid out of the balance of the \$498.92. Before you let the witness go, you may want to try to change the record in some way, to explain the record.

Mr. Maury: I don't think we have any explanation to worry about. Perhaps counsel for the de-

(Testimony of William Liskey.)

fense might, but inasmuch as all these checks were presented after the 3rd of August, according to the testimony of the witness Charles Geers——

The Court: That's right. Geers signed the checks after the 3rd of August, evidently assuming there would be enough money in the bank to pay for them.

Mr. Maury: I don't know whether he assumed that or not, but at any rate they were all returned NSF.

The Court: All right. I notice on your Exhibit 9, which is the rejected check record, that Couch continued to draw on this account, although he knew that the balance that was transferred was all that was there, he knew there were no deposits made in the account, but nevertheless he continued to draw on the account down to 9-2-52. So on 8-7-52, he drew a check for \$642, which was more than enough to take care of the balance if no other check had been taken out of it. I am just calling your attention to that now while the witness is here.

Mr. Maury: What was that last, your Honor?

The Court: 8-7-52, John Couch drew a check for \$642. I guess maybe that is the date it was turned down, 8-7-52.

Mr. Maury: Yes, I think so.

The Court: Then on 8-7-52, John Couch drew another check for \$1,503.36. I have no other questions of the witness.

Mr. Geers: May I ask the witness a question?

The Court: Yes.

(Testimony of William Liskey.)

Cross Examination

Q. (By Mr. Geers): Mentioning the account of Charles Geers and John Couch, wouldn't it be customary, if it was a joint account, to mail a statement in both names?

A. Yes. However, it has been the feeling of our bookkeepers in the past not to transfer a new name.

Q. I have got our old balance sheet which I helped to find.

The Court: Show it to counsel and let him look at it. If it throws any light on the situation at all, we will admit it in evidence.

Mr. Geers: I found that about two months after all this came out.

The Court: Is that a statement from your bank?

The Witness: Yes, it is. [62]

The Court: Can you tell us when that was mailed out by the bank?

The Witness: Oh, some time after August 30.

The Court: After August 30?

The Witness: Yes. We close off August 30, and so that would have been the first few days of September. I wouldn't know the exact date.

The Court: Do you want that admitted in evidence?

Mr. Geers: I think it should be.

The Court: It will be received as Defendant Geers' Exhibit A in evidence.

The Clerk: Defendant Geers' Exhibit A.

(Testimony of William Liskey.)

(The document referred to was received in evidence and marked as Defendant Geers' Exhibit A.)

Q. (By Mr. Geers): Calling your attention to what is the Defendant's Exhibit A, which is a check on your branch of the Bank of America signed by Charles Geers and apparently bearing cancellation stamp of the bank on the 19th of August, 1952, can you tie that into the account of Geers or Couch?

The Court: That had to be paid out of the Couch account.

The Witness: Yes. It was paid August 19th.

The Court: Paid out of what account?

The Witness: May I see the signature card, please? Out of the joint account of John Couch and Charley Geers.

Q. (By Mr. Geers): Calling your attention to Plaintiff's [63] Exhibit 9 in evidence, I note that some of these checks which were returned are during the month of August, in fact, all but the last two. The last two, during the month of August, and according to the bank statement, which is the third page of Exhibit 7, the last column, new balance shows in many instances between August 1 and August, during the early part of August, certain deposits and a high balance on or about August 1. Were all of these checks presented to the bank after the withdrawals indicated here, on or about August 14, 15, 16, 19 and so forth? That is to say,

(Testimony of William Liskey.)

if the dishonored checks were presented when there was this balance, can you give the reason for it?

A. Well, there seems to be three checks here that were returned on the 11th, 12th and 13th, and at that time there seems to be sufficient funds in the bank. There is, in fact. The only explanation I could give is that we had a hold on the account for these deposits, for uncollected funds until our branch collected the funds that those checks that were deposited represented.

The Court: You mean to say you would turn down a check and mark it not sufficient funds, turn it back as a no account check, when your records showed you accepted a deposit in the bank?

The Witness: Very definitely, if we choose to hold the funds until they are cleared. [64]

The Court: Suppose after you turned back the check your deposits cleared and the money was there?

The Witness: Then the payee of the check will have to reclear the check.

The Court: Suppose he reclears it a second time and there is no money there?

The Witness: I am afraid he will have to go after the maker and get the money.

The Court: He might go after the bank.

The Witness: I don't think so.

The Court: Now, I want to ask this witness a question. There is something very interesting here. I don't understand it. Was there more than one John H. Couch account at your bank?

(Testimony of William Liskey.)

The Witness: Not at the same time.

The Court: Not at the same time. The John H. Couch account was transferred into a joint account on——

Mr. Maury: August 3, wasn't it?

The Court: What date did he say it was transferred to a joint account?

The Witness: I think it was July 4, wasn't it?

The Court: Well, I don't know. We have got here this date. It is dated July 2. Was it transferred to a joint account then?

The Witness: Yes. [65]

The Court: Then on July 2 the John Couch account was merged into the Couch and Geers account, is that right?

The Witness: That is correct.

The Court: Well, now, I call your attention to Defendant Geer's Exhibit A. It shows that there was a balance on August 16 of \$3,700 plus. If there was a balance on August 16 of \$3,700, why weren't these checks paid that were presented?

The Witness: I presume that the teller that took the deposit put a hold on the account for a certain number of days until the checks that were deposited were cleared by the banks that they were drawn on.

The Court: Let me see all the checks, please. Now, isn't it a fact when Mr. Geers drew this check, Exhibit A, for \$600 payable to C. W. Ohlson, at that date, on August 13, there was \$600 in the bank to cover that check? Do you want to look at that from your own records?

(Testimony of William Liskey.)

The Witness: Yes, there was.

The Court: Now, isn't it a fact that as far as Exhibit 2 is concerned, when the Defendant Geers made a check dated 8-13 to C. W. Ohlson and Quaker Oats Company for \$2,715.75, there was sufficient money in the bank to cover that check?

The Witness: Yes, I believe there was, if I remember seeing it on that statement.

The Court: Isn't it true that as far as Exhibit 3 is [66] concerned, when Defendant Geers made the check dated August 8 to H. M. McVicker and Quaker Oats Company on August 8, there was sufficient money in the bank at that time to pay the check?

The Witness: Yes.

The Court: Isn't it true when Defendant Geers made Exhibit 5, check dated August 12, 1952, payable to Harry M. McVicker and Quaker Oats Company for \$1,490.60 on August 12, there was sufficient money in the bank to pay that check?

The Witness: Yes.

The Court: The only explanation you can offer as to why the checks weren't cleared is because possibly the bank might have been holding up credits on certain deposits until the deposits cleared?

The Witness: I say possibly, because naturally I have no firsthand knowledge of it, but I am sure with that type of account with so many checks going back, that they would hold the funds as uncollected funds. The funds were on deposit, but

(Testimony of William Liskey.)

they were not available. All items deposited are subject to payment.

The Court: Although this new account was supposed to have been opened on August 2 of Geers and Couch, a joint account, nevertheless Mr. Couch makes a deposit of \$2,611.75 on August 19, and that is not put in the joint account at all, it is put in a separate account, isn't that correct?

The Witness: No, I believe that is the joint account. [67]

The Court: It doesn't show it.

The Witness: No, it doesn't. He made a true copy of it. On the other copy, they didn't have Geers' name as they should.

The Court: Listen, you bring in the records and you say they are true copies. I don't know.

The Witness: Well, they made a true copy, that is what the Court wanted.

Mr. Geers: Exhibit 7 shows exactly the same. One of the pages is a carbon of that original, your Honor.

The Witness: I see your point. We have that trouble every now and then, that the bookkeeper does not put a new name on the account as she should.

The Court: Mr. Maury, let me ask you a question.

Mr. Maury: I am not a witness, but I will try to answer.

The Court: Assuming, without agreeing, that Geers went out and bought these turkeys knowing

(Testimony of William Liskey.)

that the Quaker Oats Company had a lien on them, and he gave the check payable to the seller and the Quaker Oats Company, and assume at the time the check was given and received, there was sufficient money in the bank to take care of it.

Mr. Maury: It doesn't mean a thing unless the money is there when the check gets there.

The Court: The money is there, but it was turned down by the bank. [68]

Mr. Maury: There has got to be money.

The Court: Where is the conversion?

Mr. Maury: The conversion is in the taking of the turkeys without the checks being cleared and in the slaughtering by the processors without paying Quaker Oats.

The Court: He gave a check which was perfectly good.

Mr. Maury: The processor gave nothing to Quaker Oats at all.

The Court: The checks were good at the time they were given. Not only that, they were good down to August 19.

Mr. Maury: I disagree with your Honor. They were not good unless they were backed up by cash in the bank.

The Witness: May I say something?

The Court: Yes, I want you to say something before you get away so we won't have to call you back.

The Witness: The tellers are instructed when they take a deposit and put a hold on the account,

(Testimony of William Liskey.)

the depositor is so notified that the funds will not be available for a certain number of days.

The Court: Was Geers notified?

The Witness: I have no way of knowing. I was head of the Note Department at that time and, of course, nobody would remember that far back.

Mr. Geers: May I have another question?

The Court: Yes. [69]

Q. (By Mr. Geers): Do you have any set method of notifying the depositor?

A. The teller at the window.

Q. If the man didn't come in for thirty days, you would tell him then?

A. No. If a man makes a deposit there at the window, if the teller is going to hold that amount to have those checks collected, you tell the depositor that you are sorry, but they will have to put a hold on the account for five days until the check clears the bank it is drawn on.

Q. At the time all these checks were written, we did have around \$4,000 in the bank.

A. You had a balance.

Q. The reason your bank was holding those checks and not paying them is because another branch had a check for \$2700 and some dollars, and it was eventually paid off in cash, I think, but at that time you were holding up our whole business, we couldn't buy from people or operate our business because you had all our assets tied up.

The Court: I think you are arguing with the witness. The record speaks for itself. According to the

(Testimony of William Liskey.)

bank records there was sufficient money on deposit to pay the checks.

The Witness: Well, is that legal in this state?

The Court: You are arguing the legal problem with the witness. You can ask questions, but you can't argue with the [70] witness.

Mr. Geers: Is it legal under the state banking laws?

The Court: I am sorry, this witness cannot testify to that.

Mr. Maury: I observe it is a little after 12:00, and the witness can evidently make a run to Norwalk between now and 2:00 and get the deposit slips which back up these deposits in August of 1952 to show us if they were cash deposits or on other banks.

The Court: It might be very important.

Mr. Maury: I do want him back.

The Court: All right. We will take a recess.

Mr. Maury: May he be instructed to get all the other documents?

The Court: Yes. You are instructed to go to the bank and get your records that can throw any light on this transaction and bring them back to court at 2:00 o'clock.

Mr. Maury: Thank you.

The Court: Court will now stand at recess until 2:00 o'clock this afternoon.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day.) [71]

Los Angeles, Feb. 24, 1954; 2:00 o'clock p.m.

The Court: You may proceed.

WILLIAM LISKEY

called as a witness by and on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination

Q. (By Mr. Maury): Mr. Liskey, have you visited the bank in Norwalk where you are employed during the noon hour?

A. Yes, I have.

Q. Have you obtained the deposit slips pertaining to the account of John H. Couch during the month of August, 1952? A. Yes.

Q. Can you tell the Court what deposits were made during the month?

The Court: Have you got the deposit slips? I think they speak for themselves. They should be introduced in evidence if you are going to use them.

Mr. Maury: Surely. I will let opposing counsel see them.

The Court: They may be marked for identification Plaintiff's Exhibit 10. [72]

The Clerk: 10 for identification.

Mr. Maury: There are five different slips here, your Honor, and it is possible we might want a different designation on each one, so may we number them and then have A, B, C, and so forth?

(Testimony of William Liskey.)

The Court: Yes, they may be marked 10, 10-A, 10-B, 10-C and 10-D.

(The documents referred to were marked Plaintiff's Exhibit Nos. 10, 10-A, 10-B, 10-C and 10-D for identification.)

Q. (By Mr. Maury): Calling your attention now to the Defendant Geers' Exhibit A, the Plaintiff's Exhibit 7, and Exhibits 10, 10-A, 10-B, 10-C, 10-D respectively, can you tell us whether or not Exhibits 10, 10-A, 10-B, 10-C and 10-D are reflected in the bank statements which are Geers' Exhibit A and Plaintiff's Exhibit 7?

A. Yes, they are.

Q. I call your attention to Exhibit 10. Can you determine where that is reflected?

A. That is a deposit of \$789.50 received on August—

The Court: I wonder if it would be possible for the witness to mark where it is reflected upon the sheet.

The Witness: Received on August 1, 1952 and posted on the account on August 1.

Q. (By Mr. Maury): You have shown where that is [73] reflected on Defendant Geers' Exhibit A. Can you show it on Plaintiff's Exhibit 7, which is a carbon copy?

A. Yes, that is also on August 1.

Q. Is there a debit in the same month?

A. Yes, there is on August 4.

Q. In the amount of \$789.50? A. Yes.

Q. What does that indicate?

(Testimony of William Liskey.)

A. That would indicate that this check, one item they deposited on August 1, 1952, was returned for insufficient funds or various reasons from the bank it was drawn on and, therefore, was debited against the account.

The Court: You mean to say after it was deposited, then you took off the deposit, is that right?

The Witness: No, sir.

The Court: Well, was it deposited a second time?

The Witness: It was deposited a second time. However, the first time this check was deposited, it was drawn on, I believe, Security First National Bank in Downey, and they returned it unpaid.

The Court: Then it was redeposited?

The Witness: No. Therefore, we took it off his account and one of the gentlemen evidently picked it up, and then they redeposited the check again.

Q. (By Mr. Maury): What date did they redeposit? [74] A. On August 8th.

Q. Calling your attention to Exhibit 10-A for identification, does this indicate the redeposit of that amount?

A. Yes, it does, the same amount, drawn on the same bank and branch.

Q. I observe on this statement, Defendant Geers' Exhibit A, certain items have the figures LST after them. What does that mean?

A. These were a service charge—well, it is a service charge on a returned check. These dittos are charges for checks which have been returned

(Testimony of William Liskey.)

unpaid. This one is a debit. The check had been deposited and returned. That indicates that that amount was taken out of the account. In other words, it is not a check that the customer wrote against his own account.

The Court: Referring to Exhibit 10-A, I notice the deposit slip says John Couch and Charles Geers, \$789.50. Will you show me on the record where that is deposited to the account of John Couch and Charley Geers?

The Witness: I can show you a name and the date, John Couch.

The Court: According to the bank records, it is only deposited to the account of John Couch, that is, according to the records you have before you. [75]

The Witness: According to this sheet, yes, according to the name that is on the sheet. However, that is the joint account and I would say the signature card governed.

Q. (By Mr. Maury): Calling your attention to 10-B, 10-C and 10-D, can you show the Court where they are reflected as deposits?

A. 10-D in the amount of \$1,263.10 on August 12th.

Mr. Nimocks: I'm sorry. I can't hear you over here.

The Witness: This check in the amount of \$1,263.10 was deposited on August 12th, also posted to the account on August 12th on the original, and it also appears on our certified copy.

(Testimony of William Liskey.)

The Court: This also shows that the account deposit slip is in the name of John H. Couch and Charley Geers, but it only appears upon the statement of John H. Couch, is that right?

The Witness: That's right.

Q. (By Mr. Maury): Will you show where 10-C is reflected?

A. That is \$2,514.30 on August 13th and credited to his account in that amount on August 13th, and also appears on our certified copy, August 13.

The Court: And this 10-C deposit slip is John H. Couch only?

The Witness: Yes, sir. [76]

The Court: And it is in the record of John H. Couch?

The Witness: Yes, sir.

Q. (By Mr. Maury): As to 10-D, will you explain that to the Court?

A. In the amount of \$463.67 deposited August 30, 1952, appears on their statement in that amount on August 30, 1952, and also on our certified copy on that date.

The Court: Isn't that the amount that was transferred from the Couch account to the Couch and Geers account?

The Witness: No, sir. Wasn't it \$400 even?

The Court: You have got it there.

The Witness: Just a second and I will look. Yes. \$400 is, I believe, the balance transferred, isn't it?

The Court: You are testifying, I am not.

(Testimony of William Liskey.)

The Witness: That is what is indicated here, \$400.

The Court: I can't keep track of my own records.

Mr. Maury: That is on the first page of Plaintiff's Exhibit 7.

Q. Calling your attention to the date column on the Defendant Geers' Exhibit A and the date column on Plaintiff's Exhibit 7, the fourth page thereof, can you explain the fact that on Exhibit 7 there is an opening entry apparently on August 31—is that it? A. August 30th.

Q. And this is a continuation from Defendant's [77] Exhibit A, is that right?

A. That is correct.

The Court: Is that August 30th or 3rd?

The Witness: August 30th.

The Court: The fact of the matter, then, is as far as the bank is concerned you never did open up this joint account until August 30th. It was always in the name of Couch.

The Witness: I can't answer that yes or no, but I would say as far as the bank is concerned, we opened it on July 4th.

The Court: But your records don't show it.

The Witness: That is true. She neglected to put the new name on the account.

The Court: If the bank comes in with its records, I will have to accept the bank's records.

Q. (By Mr. Maury): I will ask you, Mr. Liskey, is the name at the top of the statement governing

(Testimony of William Liskey.)

as to the owner of the account or is that merely a mailing address?

A. I would say it was a mailing address. The signature card is the governing item on who is the owner of the account. That is the contractual relationship.

Q. That is the contract between the bank and the customer, is it not? A. Yes, it is.

Q. I observe that the mailing address is just the same on each of these, but that the addressee apparently was not [78] changed until the 1st of September or August 30th, 1952.

A. That's right.

The Court: If that is so, then why weren't the Geers' checks honored? There is plenty of money in the Couch account.

The Witness: At the time, as I said before, those funds were uncollected.

The Court: Are you just telling me they are uncollected? This morning you assumed. Now, do you know whether they were uncollected funds or not?

The Witness: No, I don't know. That would be an impossibility for me, not having handled it myself personally.

Q. (By Mr. Maury): Is there any way you can tell whether or not a deposit made on August 1st would be cleared that day if it were drawn on the Security First National Bank in Downey or close by?

A. We could verify the balance of that check,

(Testimony of William Liskey.)

and that's all. They would say the check is now good. However, five minutes after the phone call the account may be closed out or the balance may be depleted below the amount of our check.

Q. When accounts begin to show returned items, what is the practice of the bank?

A. Then on all their deposits or checks drawn for other checks on branches, we hold the amount until we know [79] that the check is cleared, that the funds are good.

Q. Isn't that written into the bank book agreement between the customer and the bank?

A. I believe it says——

The Court: We have no evidence of a bank book agreement. The only evidence we have is the signature card. If you are going to have a bank book agreement, let's have the bank book.

Mr. Maury: That is very good law, your Honor. We will ask Mr. Geers if he can produce the bank book agreement between himself and the bank.

The Court: Do you have the bank book?

Mr. Geers: I never did have one.

Mr. Maury: Did they give you a bank book?

The Court: You see, he testified he didn't open up the account.

The Witness: They didn't give me a bank book.

Mr. Maury: He testified he went down to the bank and signed a signature card.

The Court: That's right.

Mr. Geers: That's right, and I could have signed that in my own home.

(Testimony of William Liskey.)

The Court: Listen. Don't argue. All we are trying to do is find the facts and when we find out the facts, then we can decide what to do.

Mr. Maury: I would like to read from Exhibit 8 at this [80] time. This is the signature card.

"The undersigned agrees with Bank of America National Trust & Savings Association that this account is to be carried by said bank as a commercial account and all funds which the undersigned depositors have or may have on deposit therein with said bank shall be governed by its bylaws, all future amendments thereof, all regulations present or hereafter to be passed by its Board of Directors pursuant to said bylaws, and by all rules and practices of said bank relating thereto, including interest, extra charges, etc."

That is the agreement with the bank. That includes all the bylaws of the bank.

The Court: What I can't understand is why in the world they didn't change the name of the account to show the two of them, rather than Couch. I can't understand that. They evidently carried a Couch account along with the joint account.

Mr. Maury: I beg your Honor's pardon.

The Court: They even have two sheets to show that they were carrying two separate accounts.

The Witness: Not two separate sheets. There is only one sheet.

Mr. Maury: No, your Honor, there is nothing like that.

The Court: Maybe I am wrong about that. You

(Testimony of William Liskey.)

have John H. Couch and then you have John H. Couch and Charley Geers on [81] August 30th. In other words, you carried it under John H. Couch until August 30th, and on August 30th this was transferred over. Now, the signature card was signed July 2nd. Why did it take pretty near sixty days for the Bank of America to change the name on the deposit.

The Witness: I would say the delay was with the Addressograph Department. I don't myself see where the printing on the statement is so important. It has nothing to do with our relationship with our customer. It is merely for mailing purposes. If a check comes in, we don't refer to the statement for the signature, but refer to the signature card. It has happened before and always happen, not too often, that the names don't get on there as they should. We send them up to San Francisco for the Addressograph Department and they are sometimes a little late in sending in new sheets. In the meantime, we should type it on there, but sometimes our bookkeepers fail to do that.

Q. (By Mr. Maury): During the month of August when there was money on deposit, your bank was honoring checks drawn by Charley Geers, was it not, Mr. Liskey? A. Yes, it was.

Q. As evidenced by Defendant McKibben, Carter, Lewis Exhibit A. Calling your attention to Plaintiff's Exhibit No. 1 and the other bank records—if the witness may have them, your Honor—can you tell from Exhibit No. 1 and the bank [82]

(Testimony of William Liskey.)

records why Exhibit No. 1 was dishonored by the bank?

The Court: I want you to testify to what you know, not what you assume. You have got the official records of the bank there. You can testify to what those records are, unless you have some personal knowledge of your own.

The Witness: This check is in the amount of \$600 drawn on the 13th of August. We received it on August 18th or 19th. This doesn't—we don't necessarily receive it on this day. It is always this day or the day after. On August 18, on his statement he had a balance to cover that \$600, and also on August 19th.

Q. (By Mr. Maury): Can you ascribe any reason for that particular check having been dishonored?

The Court: Again I want you to testify from the records of the bank or your own personal knowledge. I don't want you to assume something you don't know anything about.

Mr. Maury: If you can't testify, Mr. Liskey, you just say so, because if you did not do it, you are in no wise responsible, but, on the other hand, we want to know either from the bank records or from your own knowledge just why it was that that check was dishonored.

The Witness: I have no personal knowledge whatever why it was dishonored.

Q. (By Mr. Maury): Did you bring with you

(Testimony of William Liskey.)

this afternoon the rejected check records of your branch of the [83] Bank of America?

A. Yes, I did.

Q. Can you find that item thereon, namely, Plaintiff's Exhibit 1 for \$600?

A. Yes. I find that item on August 19, 1952.

Q. Do you find other items there drawn by the same drawer?

A. Yes, I do. One for \$200 and one for \$1,715.75.

Q. That would make, then, a total of over \$2500, would it not? A. I guess it would.

Q. On the date those three checks were presented to the bank, do these statements show there was \$2500 on deposit?

A. No. The statement shows a balance of \$1,-089.77.

The Court: The \$600 check could have been paid?

The Witness: I would say it could.

Q. (By Mr. Maury): I notice that there is a deposit on August 13, 1952, drawn on the bank with the call number 90-1416. Is that the same call number of the bank upon which the \$789.50 check was drawn earlier in the month which bounced?

A. Yes, that is the same number, same bank and branch.

Mr. Maury: At this time, your Honor, I think we will offer 10, 10-A, 10-B, 10-C and 10-D for identification.

The Court: They may be received in evidence.

The Clerk: 10, 10-A, 10-B, 10-C and 10-D. [84]

(Testimony of William Liskey.)

(The documents referred to were received in evidence and marked Plaintiff's Exhibit Nos. 10, 10-A, 10-B, 10-C and 10-D.)

Q. (By Mr. Maury): If, then, a deposit was made of \$2,514.30 on August 30th on that bank, the Security First National Bank in Downey, when in your experience with banking practices would it have cleared?

A. Well, if it was the middle of the week——

The Court: That depends a great deal on what community the check comes from. If it comes from San Francisco, it couldn't clear as fast as one here locally.

Mr. Maury: That is what I asked. He said it was the Security First National Bank in Downey.

The Court: You are referring to just that one check?

Mr. Maury: Yes, I am asking how soon it would clear. It is deposited on the 13th of August.

The Witness: If we took it at the beginning of the week or the middle of the week, I would say four days. Possibly five days if taken on Saturday, because you have Sunday in there. The reason is that it doesn't go directly to Downey. It goes into Los Angeles first.

The Court: May I ask a question about procedure?

Mr. Maury: Certainly, your Honor.

The Court: A depositor comes in and deposits a sizable amount. You don't let the depositor draw upon that deposit [85] until it has been cleared. Do

(Testimony of William Liskey.)

you show in your official records that that deposit has been made before it has cleared, or do you hold it until it is cleared before you make a record upon your official records, or, if you put it upon your official records, what kind of record do you put there to indicate that no check is to be drawn against the account? What is your procedure?

The Witness: To begin with, we are on delayed business. If we receive a deposit today, it won't be posted until tomorrow. If we wish to hold the funds, we will post the deposit to the customer's account as of today's date. However, we have a little form, a temporary hold order we attach to the account, and you put on it the amount, the bank it is drawn on, how many days it should be held, and why. Before you do that, you tell the customer at the window he will be unable to draw against that for a number of days.

The Court: To your knowledge, can you testify you ever saw one of those holds on this particular account?

The Witness: No, I cannot.

The Court: To your own knowledge, you never told either Mr. Couch or Mr. Geers that there was a hold order, did you, that is, to your own knowledge?

The Witness: No, sir.

Q. (By Mr. Maury): You never met Mr. Couch and Mr. Geers, did you, Mr. Liskey? [86]

A. Maybe I did two years ago, I don't know,

(Testimony of William Liskey.)

but I don't believe so. I have met a lot of them when they come in the bank.

Q. To go on with this inquiry, we haven't determined about the \$600, but as to the check for \$1,715.75, which was drawn August 13, 1952, can you determine from the records before you why that check was dishonored?

A. No, from the records I cannot determine. Just a minute. Maybe I was too fast there on the draw. I will have to take that back. We received this check, it was presented to us on the 19th of August, 1952, and at that time there was not sufficient funds in the account to cover that check. The check was for \$1,715.75, and the balance in the account was \$1,089.77.

Q. Calling your attention now to the Plaintiff's Exhibit 3 in evidence, can you tell us why this check was dishonored by the bank?

Mr. Nimocks: What is the amount and date?

The Witness: \$1,432.20. No. The date this check was presented for payment was on August 12, 1952. From the records I have here, I find no reason why the check should be returned. We have a double date on the 12th.

Q. (By Mr. Maury): What do you mean by double date?

A. We have August 12th there twice.

Q. I don't see where you mean. [87]

A. On August 12th, balance \$1,341.38, and also on August 12th, there is a deposit of \$1,263.10,

(Testimony of William Liskey.)

which gives us a balance of \$2,694.58. That is evidently the true balance.

Q. I understand that the Defendant Geers' Exhibit A and this third page of Plaintiff's Exhibit 7 are supposed to be carbon copies or exact duplicates of one another? A. Yes.

Q. I wish you would go down the line with me on this balance.

A. I see it already. You are talking about the 12th. I was just talking about this one.

Q. I am talking about the list of figures there.

A. Here we are. I can tell you what happened there, but I can't tell you what happened from my own experience.

Q. From your knowledge of banking procedure, can you explain this?

A. Yes. The bookkeeper picked up a balance as of the 11th, posted three checks, and totaled out the machine, and then she went on and discovered she had neglected to post a deposit, all in a matter of thirty seconds, probably, so she picked the balance up again and posted the deposit.

Q. It comes out the same in both, is that right?

A. That's right. Therefore, we have two dates as of the 12th.

Q. That explains the discrepancy between the two, then? [88] A. Yes.

Q. Have we talked about Exhibit No. 5? That is the check for \$1,490.60. Can you tell us why that was dishonored by the bank?

A. No, I cannot.

(Testimony of William Liskey.)

Mr. Nimocks: Can you talk just a little louder?

The Witness: I am sorry. No, I cannot say why the check was dishonored on that date. The check was for \$1,490.60.

Q. (By Mr. Maury): What was the balance in the bank on that date?

A. On August 13 the balance was \$3,705.52.

Q. On August 13th, what deposits were made?

A. A deposit of \$2,514.30.

Q. And the day before that, what deposit had been made? A. \$1,263.10.

Q. As evidenced by the deposit slips 10-B and 10-C, is that correct, in evidence?

A. Yes, that is correct.

Q. Would either of those deposits have had time to clear by the time——

The Court: Can you tell me what those deposits were?

The Witness: They were checks drawn on the Security First National Bank in Downey.

The Court: Were they personal checks?

The Witness: I do not know. [89]

Q. (By Mr. Maury): Were they drawn on the same bank as the deposit of \$789.50 that bounced early that month? A. Yes, they were.

Q. If they were items drawn on that bank in Downey, that is the Security First National Bank, evidenced by Call Number 90-1416, one of them having been deposited on August 12th and the other August 13th, would they have had time to

(Testimony of William Liskey.)

clear by the time Plaintiff's Exhibit 5 was presented to the bank at Norwalk?

A. No, they would not have.

Q. Without those two deposits, what was the balance in the account on August 12 when Plaintiff's Exhibit 5 was presented?

A. Well, we have three checks there on that same date, which we have to take into consideration. Did you say August 12th?

Q. Yes.

A. On August 12th, the balance on the ledger shows a balance of \$2,694.58.

Q. With the two deposits made on August 12th and 13th, respectively, how much would there have been without those two deposits? Isn't it just about zero, a very few dollars?

A. Perhaps I am not following you.

Q. We have a balance on August 13 of \$3,705.52.

A. That is correct. [90]

Q. You show the same balance on August 14 less \$1, and the same balance on August 16, less \$2.

A. That's right.

Q. We have deposits here on August 12 of \$1,263.10.

A. Right.

Q. And on August 13 of \$2,514.30.

A. Yes.

Q. Both drawn on the Security First National Bank of Downey.

A. Yes.

Q. We note that the first deposit this month of \$789.50 was drawn on the same bank, and it was deposited August 1 and was back dishonored on

(Testimony of William Liskey.)

August 4. Without these two deposits on August 12th and 13th, respectively, would the balance in the bank at that time have been sufficient in cash, liquid assets to the credit of Couch and/or Geers, to meet the check for \$1,490.60?

A. No, it would not.

The Court: Now, I want to ask you a question. On August 12th there was a deposit of \$1,263.10. On August 12 you cleared a check for \$1,775.48, another check for \$1,116.20, and another check for \$1,155. Why did you clear three checks and refuse to clear the fourth or fifth on the same day?

The Witness: Are you asking me from my own personal knowledge? [91]

The Court: I am asking you to testify from the records. That is the only thing you know. All I have is the records. You have got a deposit on a certain date. You recognize and pay three checks, one for \$1,775.48, one for \$1,116.20, and one for \$1,155. On that day you get a deposit of \$1,263.10. When the day is over with, you have \$2,694.58.

Why did you refuse, do you know why the bank refused to clear one check?

The Witness: No, I do not.

The Court: Also, on August 13th there shows a deposit of \$2,514.30. On that day you paid, you cleared a check for \$1,503.36. Why was that check cleared and other checks refused to be cleared, do you know of your own knowledge?

The Witness: No, I don't.

(Testimony of William Liskey.)

Q. (By Mr. Maury): What is go-back time, Mr. Liskey?

A. Oh, I would say approximately between 3:00 to 4:30. You have to average it out. Some afternoons you may start at 3:00, a few minutes after, on busier days they may not be able to have them ready until 4:00 or after.

The Court: Will you tell me what you mean by the term go-back?

Mr. Maury: That is what I am coming to.

Q. What does that term mean in banking parlance?

A. At that time all these checks that have been—that have gone through the bookkeepers, the bookkeepers find [92] there is either a hold on the account or insufficient funds or irregular signature, find they cannot pay them, they put them on this list. This is what we call our rejected check record. They describe it, put the reason, and then the disposition, where the check will be returned to, and any charges, if any. The head bookkeeper gets those at approximately that time, and the manager reviews that list. and if there are any credit arrangements between certain customers and the bank as to paying their checks, he will go ahead and pay them, and those that have no credit arrangement, he will return them to the bank they came from.

Q. I would like to know from this rejected check record why the Plaintiff's Exhibit 1, 2, 3 and 5 are shown to have been rejected by the bank, from the rejected check record?

(Testimony of William Liskey.)

A. Do you want them separately?

Q. Yes, if you would, please.

A. The check for \$1,490.60——

Q. Plaintiff's Exhibit 5.

A. That was returned for not sufficient funds.

Q. Yes, sir.

A. Check in the amount of \$1,432.20 on August 12th was returned for not sufficient funds.

Q. Plaintiff's Exhibit 3, that is.

A. And the amount of \$1,715.75 on August 19th——

Q. That is Plaintiff's Exhibit 2. [93]

A. That was returned for not sufficient funds.

Q. And \$600?

A. That \$600 on August 19 was also returned for not sufficient funds.

Q. Those are the official records of the bank kept in the regular course of business?

A. Yes, sir.

Q. Can you tell me whether or not the Plaintiff's Exhibit 4 for identification was ever presented to your bank, that is, a check for \$1,365.90, with the questioned signature on it?

A. Yes, it was presented to our bank for payment, I would say on—well, this indicates it was sent from our bank on August 15, 1952. It was not sent through the usual channels, but as a collection item.

Q. Can you find that upon this rejected check record?

(Testimony of William Liskey.)

The Court: You say that was received August 15?

The Witness: I would say it was the 16th, and it would have been the day after it left the other bank. On the 16th then. This record doesn't indicate we had received the check prior to that time.

The Court: The question is what was it turned down for?

The Witness: I am sorry. From the records, I cannot say.

Mr. Nimocks: What is the answer?

The Witness: From the records, I can't say why the check [94] was returned.

The Court: The bank statement shows a balance of \$3,732.

The Witness: That is correct.

Mr. Maury: May this be marked for identification?

The Court: It may be marked for identification Plaintiff's Exhibit 11.

The Clerk: Plaintiff's Exhibit 11 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. Maury): Calling your attention to this form, are you familiar with that type of form?

A. Yes, I am.

Q. What is it?

A. It is an incoming interbranch collection.

Q. By that what do you mean, what is its function and how does it operate?

(Testimony of William Liskey.)

A. The customer of the bank, not necessarily a customer, may go into one of our branches with a check drawn on another branch and wishes to cash the check, and perhaps for some reason they don't want to cash it there, or perhaps it has been dishonored previously, and he will go over to the Collection Department and ask if they will accept the check for collection and forward it to the bank upon which it is drawn. If they do accept it and it is one of our branches, that branch will use this form to send to the other branch [95] with the check and instructions will be on it to hold a certain number of days, and if not, we will return it within twenty-four days if there was not sufficient funds, but the purpose is to collect the amount of the check.

Q. From the branch filled in in typing, what does that particular document indicate to you, what kind of transaction was had?

A. It would indicate we received this check in the amount of \$4,288.70 from our Soto-Hostetter branch. It was a check and their instructions were to hold ten days if necessary.

Q. Could that be a group of checks?

A. It could be, yes. Under "documents" here it says checks, it doesn't say check. It could, then, be a group of checks.

Q. The date is what? A. August 15.

Q. 1952? A. 1952.

The Court: Let me ask you a question. If a depositor comes in and gives you a check for collec-

(Testimony of William Liskey.)

tion, you don't give him credit upon his deposit account, do you?

The Witness: No, sir.

The Court: The fact that on August 8th and 11th and 12th and 13th you got sizable deposits on your record does not [96] indicate that they were deposits for collection.

The Witness: No, they were not deposits for collection. Those are two separate departments altogether.

Q. (By Mr. Maury): Calling your attention to the exhibit you have in your hand, which is Exhibit 11 for identification, was that received by your branch or sent from your branch?

A. Received by our branch.

Q. From another branch? A. Yes, sir.

Q. In other words, it indicates somebody else sent the checks to you, is that right?

A. That is correct.

Q. With instructions to hold for ten days if necessary? A. That's right.

Q. Does it indicate who sent these checks to you from another branch?

A. The other branch's customer?

Q. Yes.

A. Quaker Oats Company.

Mr. Maury: I now offer that in evidence.

Mr. Nimocks: Just a moment. I will object to that. There is no itemization of that. We have no way of knowing what those checks are, so I can't see it is material.

(Testimony of William Liskey.)

The Court: Overruled. It may be received for whatever it [97] is worth. It may be received in evidence.

Mr. Maury: You can't prove every fact in a case by one exhibit or one witness.

The Clerk: Plaintiff's Exhibit 11 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. (By Mr. Maury): Calling your attention to the Defendant Geers' Exhibit A in evidence and to the dates August 14, 16 and 19, and to the items, four in number, each one being \$1 and followed by the letters LST, can you tell the Court what that indicates?

A. That \$1 would indicate a check had been returned unpaid and a dollar is the charge.

Q. Made against the customer?

A. Made against the customer by the bank.

Q. For a check?

A. For a check we did not honor.

Q. Calling your attention to these rejected check records, can you tell us whether there are any other checks on here drawn by Charley Geers or John H. Couch during the month of August, 1952? In other words, would you give us a list of all rejected checks which were drawn by them and read them into the record?

Mr. Geers: Could I make an objection? I don't see what other checks have to do with this case.

The Court: Overruled.

(Testimony of William Liskey.)

The Witness: On August 5, 1952, check in the amount of \$1475 drawn by John Couch returned for not sufficient funds.

On August 7, 1952, check in the amount of \$10 drawn by John Couch returned for not sufficient funds.

On the same date in the amount of \$642 drawn by John Couch, returned for not sufficient funds.

On the same date, \$22.40 by John Couch, returned for not sufficient funds.

Also, the same date, \$1,503.36, drawn by John Couch returned for not sufficient funds.

On August 9, 1952, check in the amount of \$136.48, drawn by John Couch, not sufficient funds.

On August 12, 1952, check in the amount of \$1,432.20, drawn by Charley Geers, returned for not sufficient funds.

August 13, 1952, check in the amount of \$1,490.60, drawn by Charley Geers, returned for not sufficient funds.

On the same date, check in the amount of \$43.20 by John Couch, returned for not sufficient funds.

August 19, 1952, check in the amount of \$200 drawn by Charley Geers, returned for not sufficient funds.

On the same date, check in the amount of \$600 by Charley Geers, not sufficient funds.

Same date, \$1,715.75, drawn by Charley Geers, returned for not sufficient funds. [99]

August 20, 1952, check in the amount of \$3.23,

(Testimony of William Liskey.)

drawn by Charley Geers, returned for not sufficient funds.

August 22, 1952, check in the amount of \$136.48 by John Couch, not sufficient funds.

On the same date, \$25 by John Couch, not sufficient funds.

Also, \$148.83, John Couch, not sufficient funds.

And \$150 by John Couch, not sufficient funds.

On August 26, in the amount of \$25 drawn by John Couch, returned, not sufficient funds.

August 28, 1952, check in the amount of \$142, drawn by John Couch, not sufficient funds.

September 2, 1952, check in the amount of \$148.83, drawn by John Couch, returned, not sufficient funds.

September 3, 1952, check in the amount of \$136.48, drawn by John Couch, not sufficient funds.

Mr. Nimocks: Your Honor, may I inquire as to what that information is coming from? Has that been marked for identification?

The Court: He is really just reiterating what is already in evidence. It has been in evidence already.

Mr. Nimocks: I was just curious as to what he was reading from.

Mr. Maury: I am sorry. I thought you had seen these, counsel.

The Court: While you are thinking of a question, I have [100] a question I want to ask.

Mr. Maury: Yes, your Honor.

The Court: I want to be sure I understood about Exhibit 11. This is your interbranch collection. Do I understand that the checks were sent from your

(Testimony of William Liskey.)

branch to this Soto-Hostetter branch for collection or was it vice versa?

The Witness: It was sent to us from the Soto-Hostetter branch, sent by them to our branch.

The Court: This is dated August 15.

The Witness: Yes.

The Court: It would get there the following day, August 16.

The Witness: I would think so, yes.

The Court: On August 16, according to your own records, there was \$3,702.52 on deposit.

The Witness: That is correct.

The Court: If you got these checks, and you say there was more than one check, wouldn't you have taken care of the checks you could take care of out of this account?

The Witness: Yes, very definitely.

The Court: Why didn't you, do you know?

The Witness: I had nothing to do with it.

The Court: You don't know why?

The Witness: No.

The Court: It also appears that on August 19 the bank [101] paid a check for \$2,611 to somebody, and on August 25 they paid a check for \$1,020.52. In other words, these two checks were paid some time after you had received these checks from the Quaker Oats Company. Could it be that that interbranch collection said the drawee was Charles Geers? The account I have been referring to is John H. Couch. Could it be the fact that you

(Testimony of William Liskey.)

didn't try to collect these Geers' checks from John H. Couch account?

The Witness: No, I don't believe so.

The Court: You don't know why they weren't collected?

The Witness: I don't know why, no.

The Court: I am through with the witness.

Mr. Maury: I don't want to argue the case at the present moment, your Honor.

The Court: That's all right.

Mr. Maury: On the other hand, I might ask him to answer what I think is the question in your Honor's mind with reference to the Defendant McKibben, Carter and Lewis Exhibit A, a check drawn by Charley Geers during this period.

Q. Was that made out on the account of John H. Couch, the account that is designated John H. Couch upon the ledger sheet?

A. On August 7, 1952, Charley Geers drew a check in the amount of \$2,611.75. Our bank paid that check on August 19th on the account that appears to be that of John Couch. [102]

Q. The bank honored this signature?

A. Yes, they did.

The Court: What I can't understand is if they were honoring Geers' signature on this account, why, when they received these Quaker Oats checks on August 16th, they didn't immediately collect them out of this account. The money was there.

The Witness: It might not have been a good balance.

(Testimony of William Liskey.)

Mr. Maury: August 15, 1952 was Friday, and I think the Court takes judicial notice in 1952 the Bank of America was the only one open on Saturday around here.

The Court: All right. What would be the next business day?

Mr. Maury: The next business day for the Security First National Bank or any other bank than the Bank of America would be Monday, which would be the 19th. We see here from the statement, and this is argument, I must say, but I am trying to clear up a point, the deposits were made on the 12th and 13th. These checks hit the 16th, let us say, for collection. They are in one department. This \$2,675 check hits on the 19th, which is very close in point of time there, so obviously the bank refused other checks because of the funds not having cleared, and cleared this check of \$2,611. Some checks are cashed at the window. So the record shows there was NSF as to these checks, and these are the records [103] kept in the regular course of business of the bank. With a bad check record like that and another record of deposits of bad check items, I think the bank was warranted in being amply cautious about this particular account. I wasn't there either. I don't want to argue this case here.

The Court: Do you have any more questions for this witness?

Mr. Nimocks: May I ask a few questions?

(Testimony of William Liskey.)

The Court: I would like to finish with the witness before the afternoon recess.

Mr. Nimocks: I have just a few questions.

The Court: The bank is paying his salary, and I don't want to keep him any longer than is necessary.

Mr. Nimocks: I thought we might try to clarify this process about collection.

Cross Examination

Q. (By Mr. Nimocks): As a matter of fact, Mr. Liskey, when a deposit appears on this particular sheet, and I am referring now to Geers' Exhibit A, which I understand is the original of No. 7, I believe it was, when this deposit appears on this sheet, you have actually given that man credit for that amount of money, is that not true, subject to being charged back for any return item that might come in, is that correct? [104]

A. That's right.

Q. If you accept an item for collection, that item does not appear upon this sheet until such time as the funds have been received by your bank and the item is collected.

A. And then only if he gives the instructions.

Q. But when these appear upon here, he has been given credit in the full amount even though the checks have not cleared yet, subject to being charged with such checks as might be returned?

A. That is correct.

Q. What do you do on collection items, sir? Do

(Testimony of William Liskey.)

you put those in a suspense account or how do you handle those?

A. The customer is given a receipt. We don't recognize it as funds, you might say. The customer gives us his check and we give him a receipt for that check, and any money is out of his pocket, that's all. We have the check there. We don't want it in an account.

Q. That item does not affect the balance in any way until the money has been received, is that correct?

A. That is correct.

Q. This Plaintiff's Exhibit 9, Mr. Liskey, is this a composite drawn from the various sheets you were testifying to?

A. This is, you might say, a recapitulation of these sheets here. [105]

Q. But it contains only the items which pertain to Charley Geers and John H. Couch, is that correct?

A. That is correct.

Q. I am unable to locate Plaintiff's Exhibit 1 or a check in the amount of \$600 that was returned. Was that merely an error in picking them up from these sheets?

A. Yes. I would say that was my error, because we have discussed that just a few minutes ago, that \$600. I pointed that out earlier, too, that we had left that off of there.

Q. Was Plaintiff's Exhibit No. 2 in the amount of \$1,715.75?

A. Yes. Those appear on this one here as of August 19.

(Testimony of William Liskey.)

Q. That is just an error in transcribing, is that correct? A. Yes, it is.

Q. I presume the same way with Plaintiff's Exhibit No. 4 in the amount of \$1,365.90, which I think you show upon August 15 or 16.

A. \$1,365.90?

Q. Yes, Plaintiff's Exhibit No. 4.

A. That would not appear.

Q. That was a collection item?

A. Yes, that would not appear on there. [106]

Q. As to the collection sheets submitted by your Soto branch—was that the name? A. Yes.

Q. That shows an aggregate amount of \$4,288.70 and no checks. Is it not possible that included checks which had previously been returned by your bank? A. Yes, that is possible.

Mr. Nimocks: That's all, your Honor.

Mr. Maury: Just one or two further, your Honor.

Redirect Examination

Q. (By Mr. Maury): When an account has a record of frequent bad checks and returned items, when you credit an item to the account at the deposit, is it credited as a cash item subject to being charged back, or is it, as you have previously described, credited subject to collection?

A. It is more along the lines of a collection, because although it appears on his sheet at the same time, a notation appears that it is being held and the customer is so informed.

Q. Doesn't it depend upon the customer's credit,

(Testimony of William Liskey.)

whether the item is sent through as a cash item or whether his account is flagged?

A. Very definitely.

Q. Will you tell the Court what the determining [107] factors are?

A. Well, if the customer has quite a few checks he deposits that are returned or if he is in the habit of drawing checks against insufficient funds himself, then that would be a determining factor in holding all deposits until those checks have been paid and we have received our money on them.

Mr. Maury: Could we have our recess, your Honor, and then if we wish to recall the witness, may we do so?

The Court: We will now take a recess until twenty minutes after 3:00.

(Recess.)

Mr. Maury: As far as we are concerned, we are through with the witness.

Mr. Geers: May I ask the witness a question?

The Court: Yes.

Cross Examination

Q. (By Mr. Geers): If Johnny Couch had come in after the close of business on August 13, we will say he came into the bank himself in person on the 14th or 16th——

A. At the close of business?

Q. He had come to the window and written a check for this amount of money, could he have

(Testimony of William Liskey.)

closed the account out, [108] and would you have accepted his check in that amount?

A. We would have.

Mr. Geers: That's all. Thank you.

Redirect Examination

Q. (By Mr. Maury): What day was that?

A. August 16.

Q. \$3,702.52. If there was a flag on the account, would you have accepted his check at the close of business on that day?

A. Not if there was a flag on the account, no.

The Court: May this witness be excused now?

Mr. Nimocks: There is a new question now.

Recross Examination

Q. (By Mr. Nimocks): What do you mean, a flag on the account, Mr. Liskey?

A. He meant the flag where you put stop payment or hold. I meant the temporary hold.

The Court: This witness testified he never saw a temporary hold on this account.

Q. (By Mr. Nimocks): Do you keep a permanent record of those temporary holds or flags or anything of that nature? [109]

A. The flags we do, because they are stop payment. We keep those until the customer releases them. But the holds, when the time is up, the bookkeeper pulls them off and throws them in the wastebasket.

(Testimony of William Liskey.)

Q. So you have no way of knowing whether there was any hold on this at all? A. No.

Q. Referring to Plaintiff's Exhibit 8, the signature card, do you know whether this signature is the signature of Charley Geers?

A. I would not know on any of these signature cards.

Q. Does it appear to be the same signature as is on this check here?

Mr. Maury: Which is that, counsel?

Mr. Nimocks: Excuse me. 1.

The Court: I don't think this witness is a handwriting expert at all. He testified a little while ago and if there had been an objection I would have sustained the objection.

Mr. Maury: Geers testified that was his signature on the check, Exhibit 1.

The Court: That's right.

Mr. Nimocks: Mr. Maury raised the question about the handwriting——

The Court: If Mr. Geers did not sign it, he can get up here and testify he did not sign it. He can meet that issue. [110]

Mr. Nimocks: Thank you, your Honor.

The Court: May this witness be excused?

Mr. Nimocks: Yes.

The Court: My advice is to get out of here as quickly as possible.

The Witness: I am on my way.

The Court: Call your next witness.

Mr. Maury: I will call Mr. Brooks.

WILLIAM B. BROOKS

called as a witness by plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Take the stand, please. State your name.

The Witness: William B. Brooks.

Direct Examination

Q. (By Mr. Maury): Mr. Brooks, what is your occupation? A. I am a district representative.

Q. By whom are you employed?

A. I am employed by Glesby Bros. Grain & Milling Company.

Q. What business are they in?

A. They are in the manufacturing feed business.

Q. How long have you been with them?

A. Seven months.

Q. During the month of August 1952, by whom were you employed?

A. In August 1952 I was employed by the Quaker Oats [111-14] Company.

Q. What was your capacity there?

A. I was district representative for Riverside County.

Q. Did you have under your jurisdiction the area of Perris? A. Yes, I did.

Q. Are you acquainted with Mr. McVicker and Mr. Ohlson, growers up there? A. Yes, I am.

Q. How long had you known them?

A. Approximately from 1951, July 1951, to the present date.

Q. Were you acquainted with Mr. John Couch?

(Testimony of William B. Brooks.)

A. Yes.

Q. How long had you known him?

A. Approximately the same time, 1951. I don't know the exact date when I first met him.

Q. Will you state to the court the extent of your knowledge of Mr. Couch?

A. My personal knowledge is very sketchy.

Q. What business was he in?

A. In the business of buying and processing poultry.

Q. From whom did he buy the poultry?

A. I have no knowledge of any specific one.

Q. Generally speaking. [115]

A. Processors, raisers of poultry.

Q. Were these growers frequently customers of Quaker Oats? A. No.

Q. They were not? A. No.

Q. Did you know of Mr. Couch's reputation in the poultry industry in and about Riverside County?

A. Yes.

Q. Will you state to the court what that reputation was?

A. His reputation was that—not very favorable.

Q. What was his reputation for veracity and integrity?

A. I have no knowledge of his integrity. I have only knowledge of his paying record.

Q. That is his paying reputation?

A. His paying reputation to my knowledge was very poor.

Q. Are you acquainted with Mr. Geers?

(Testimony of William B. Brooks.)

A. No. May I correct that? I have met Mr. Geers.

Q. When did you met him?

A. I met him in—I am not sure of the exact date, but I would say some time in June 1952.

Q. Where? A. At Perris, California.

Q. What was the occasion?

A. I was making a call on my dealer, Dan Holver. Mr. [116] Geers and several, apparently, truckers came though the scales and weighed a lot of chickens. I talked to Mr. Geers and introduced myself and he introduced himself to me. We exchanged cards. He asked me if I knew of any chickens that were available for purchase in the area at that time.

I told him I had no knowledge of any at that time, that there was one flock that might possibly be available at a later date. That was the extent of my conversation with him.

The Court: Talking about chickens?

The Witness: Chickens, yes.

Q. (By Mr. Maury): Did you have any discussion at all concerning turkeys? A. No.

Q. Did you ever hear of Mr. Geers later?

A. Yes.

Q. Will you state whether you ever heard of Mr. Geers in connection with Mr. Couch?

A. Yes, I have.

Q. When was the first time you heard of the two as connected?

A. The first time was at the meeting at the

(Testimony of William B. Brooks.)

scales, as I told you. Mr. Geers gave me a card of the Park Avenue Poultry business, and wrote John Couch's and his own telephone number on it and gave it to me.

Q. As a result of that meeting and that card of Mr. [117] Couch with the telephone number, did you do anything with respect to your growers?

A. No.

Q. Did you at any time go out there and have any conversation with your growers concerning Mr. Couch and Mr. Geers? A. Yes.

Q. When?

A. On quite numerous occasions.

Q. When was the first time?

A. Are you referring to turkey growers?

Q. Yes.

A. I would say some time in the early part of August, I don't recollect the exact date, one of our growers, Carl Ohlson, advised me upon my call that he had sold turkeys to Charley Geers and John Couch and, of course, part of my duties in supervising these accounts was to make a report of the conditions and of the final sales and disposition of the birds, and Mr. Ohlson had checks he had received. He had not yet turned them in. I took the checks and sent them in to the company together with my report of that sale.

At that time I told Mr. Ohlson that the Park Avenue Poultry was not on our approved buyers list, and under any other circumstances, if any other birds should be sold to them, he should call

(Testimony of William B. Brooks.)

our credit department prior to making any [118] sale.

Q. What do you mean by "approved buyers list"?

A. The Los Angeles office issued to the representatives a list of poultry buyers who had been investigated and found to be financially solvent and, as far as their past buying record is concerned, have clean records. We were instructed to permit our growers to sell to anybody on that list without making a specific call to secure permission. If the name of the buyer was not on that list, the grower was instructed, and I so instructed all of my growers, to call the credit department in Los Angeles collect prior to making any sale of turkeys.

The Court: I understand they could make sales of turkeys to certain individuals without calling?

The Witness: Yes.

Q. (By Mr. Maury): Did each of your growers have that list?

A. No, the growers did not have the list. The district representatives were furnished with the list.

The Court: But they did have authority to sell the turkeys to people who were on the list?

The Witness: I had authority to give them the authority to sell.

The Court: Well, you did give authority to sell?

The Witness: To people on that list, yes. [119]

Q. (By Mr. Maury): Calling your attention to this document—

(Testimony of William B. Brooks.)

May this be marked plaintiff's next in order for identification, your Honor?

The Court: It may be marked Plaintiff's Exhibit 12 for identification.

The Clerk: Plaintiff's Exhibit No. 12 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Maury): Is this your signature thereon, Mr. Brooks? A. Yes, that is.

Q. Who are the other signers thereof?

A. Carl W. Ohlson and Marian T. Ohlson.

Q. Are they the growers you just mentioned?

A. Yes.

Q. Was that signed by them in your presence?

A. Yes, it was.

Mr. Maury: We offer the same in evidence, your Honor.

The Court: It may be received in evidence.

The Clerk: Exhibit 12 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 12.)

Q. (By Mr. Maury): Are you acquainted with Mr. and Mrs. [120] Harry McVicker?

A. Yes.

Q. Were they in 1952 growers in the Perris area? A. Yes, they were.

Q. Did Quaker have an agreement with them similar to that with the Ohlsons?

A. Yes, they did.

(Testimony of William B. Brooks.)

Q. Do you know Mr. Edward Leach?

A. Of Perris?

Q. No, of Quaker. A. I can't recall.

Mr. Maury: I am not quite sure it is Edward, either. I would like to have this document marked for identification.

The Court: It may be marked Plaintiff's Exhibit 13 for identification.

The Clerk: 13 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 13 for identification.)

Q. (By Mr. Maury): Are you familiar with this turkey grower agreement, Plaintiff's Exhibit 13 for identification? A. Yes.

Q. Is that document kept by Quaker Oats in the regular course of its business?

A. Yes, that is the firm. [121]

Q. Are you familiar with the signers, or the signatures thereon?

A. I am familiar with the signature of Harry McVicker and Ruth McVicker as growers.

Q. Is that their signature?

A. Yes, it is.

Mr. Maury: We offer that in evidence, your Honor.

The Court: It may be received in evidence as Plaintiff's Exhibit 13.

The Clerk: 13 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 13.)

(Testimony of William B. Brooks.)

The Court: May I go back and ask this witness a question?

Mr. Maury: Yes, your Honor.

The Court: You said a little while ago the growers were authorized to sell their turkeys to certain individuals.

The Witness: Yes.

The Court: Did you give that authorization to growers in writing?

The Witness: No.

The Court: Just orally?

The Witness: That's right.

Q. (By Mr. Maury): Did you ever give any grower any authorization to sell turkeys to Charley Geers or to John [122] J. Couch?

A. No, sir.

Q. Either orally or in writing? A. No.

The Court: The reason I am asking is that Exhibit 12, and I assume also 13, provide growers shall not encumber or otherwise dispose of said turkeys without a prior written consent. This witness didn't give written consent. He gave oral consent.

Mr. Maury: That's right. He never gave any consent at all to this particular sale.

The Court: I know, but he gave oral consent to sell the turkeys.

Mr. Maury: But not to sell these turkeys.

The Court: No.

Mr. Maury: That's what we are talking about, and what he did with others is not material.

The Court: All right.

(Testimony of William B. Brooks.)

Q. (By Mr. Maury): Calling your attention to Plaintiff's Exhibits 1 and 2 in evidence, have you ever seen those documents before?

A. Yes. I have seen Exhibit No. 1. In fact, that is my writing on the back of it. I cannot swear definitely I have seen this one. I believe I have but I can't swear to it.

Q. That is Exhibit 2. You testified a moment ago that [123] you had heard from Ohlson of a sale of turkeys by Ohlson to Geers and Couch.

A. That's right.

Q. And that he had some checks.

A. Yes.

Q. Do you know if those are the checks?

A. I know this one. I believe this one was.

The Court: Identify the exhibits for the record.

The Witness: Exhibit 1 I have seen. I got it from Mr. Ohlson personally. Exhibit 2, I am unable to say positively. I did take a check, but I can't swear without consulting my records that that is the check.

Q. (By Mr. Maury): Do you have copies of those records here? A. No.

Q. But you do remember you got two checks from the man? A. Yes.

Q. And that is what alerted you about Couch and Geers?

A. No, I wouldn't say it alerted me.

Q. What did you do thereafter with respect to Couch and Geers?

(Testimony of William B. Brooks.)

The Court: Did you get the two checks at the same time?

The Witness: Yes.

The Court: These checks are dated 8-13. Do you know when you got them? Did you get them on the 13th or 14th? [124]

The Witness: I can't say the exact date. It was very close to that time.

The Court: You didn't pick them up before the 13th, did you?

The Witness: No.

The Court: You are sure it was the 13th?

The Witness: No, I can't swear to that one way or the other. I have sent a report in to the office of the time. However, I can't swear to the exact date at this time.

The Court: All you know is you picked up these two checks around the 13th somewhere.

The Witness: Yes.

Q. (By Mr. Maury): Do you remember whether or not they were post-dated?

A. They were not post-dated.

Q. They were not. Did you have any transactions with Mr. McVicker? A. Yes.

Q. State what the transactions were with reference to Mr. Couch and Mr. Geers?

A. Several days after that first sale, I called on—I was notified by the office, after submitting these first checks, that the checks had been not honored by the bank. I was in Fontana at the time. When I got the message, I immediately went out

(Testimony of William B. Brooks.)

to the Ohlsons and from there I went to [125] McVickers. When I arrived at the McVickers' place, he had just completed a sale of all of his turkeys. He had sent two checks in to the company by letter, special delivery he told me. He had one check in his possession which he gave to me.

Q. Calling your attention to Plaintiff's Exhibits 3 and 4 for identification, and 5, can you identify those checks as the ones which were connected with this transaction?

A. If I could have a copy of my record there, I believe I would be in a position to identify these checks.

Q. Is this the document you want (indicating)?

A. Yes.

The Court: Is that a record you made yourself?

The Witness: Yes, that is a copy of the growing record.

The Court: Is it in your handwriting?

The Witness: Yes.

Q. (By Mr. Maury): Show it to me and then I will show it to opposing counsel.

A. All right.

Mr. Nimocks: Well, your Honor, I can't hear what the witness is saying. Will you instruct him to speak up?

Mr. Maury: Yes.

Q. Will you please speak up? All these gentlemen are supposed to hear what we are saying.

A. All right. As to checks Exhibit 3 and Exhibit 5, I have not seen them. Exhibit 4 is a check

(Testimony of William B. Brooks.)

handed me by Harry [126] McVicker at the time that I called on him.

Q. About the date it bears, August 13th?

A. 13th or 14th, I called on him.

Q. That was the one that he handed you?

A. Yes.

Q. That is Exhibit 4 for identification?

A. Yes.

Mr. Maury: We now offer that in evidence, your Honor.

The Court: It may be received.

The Clerk: Exhibit 4 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

The Court: How about Exhibit 4-A?

Mr. Maury: That is the exemplar of Couch's signature. We are not offering that.

Q. You have never seen 3 and 5? A. No.

Q. Did you personally transport Exhibit 4 to the office in Los Angeles?

A. No. I mailed it.

Q. You mailed it from Riverside?

A. Yes. Not from Riverside. I believe from Monrovia.

Q. But you mailed it in to the Los Angeles office of the Quaker Oats Company? A. Yes. [127]

The Court: May I ask a question?

Mr. Maury: Certainly.

The Court: You testified a moment ago you had gotten these checks and you sent them in to your

(Testimony of William B. Brooks.)

company, and you were out at Fontana then. That was several days later, I assume.

The Witness: Yes.

The Court: When you went over to see Mr. McVicker.

The Witness: Yes.

The Court: Did you go that same day?

The Witness: Yes.

The Court: You found out that Mr. McVicker had just completed the sale of his turkeys.

The Witness: That's right.

The Court: What do you mean by that? You mean on that particular day?

The Witness: My recollection is he had sold them two lots the day before and the last lot early that morning. When I came there, he was just returning from the scales with the check.

The Clerk: I notice the McVicker's check is dated August 13.

The Witness: Yes.

The Court: And also the other checks were dated August 13. According to your testimony, there was three or four days [128] difference between the time you took the first two checks and the McVicker check.

The Witness: Yes, that is true. This happened two or three years ago. I am trying to get my dates in order here.

The Court: May I see Exhibits 1 and 2, please? Here are Exhibits 1 and 2. You say you picked up those checks on or about the 13th day of August.

(Testimony of William B. Brooks.)

The Witness: I have that clear in my mind now. These checks were picked up at the same time these checks were picked up.

The Court: The McVickers' checks?

The Witness: Yes. The first that I heard of the Ohlson birds occurred several days before that. Those checks were sent in and those were the checks that I was advised by telephone by Mr. Woods of our office had not cleared the bank.

The Court: Are they Exhibits 1 and 2?

The Witness: No.

The Court: They are different checks?

The Witness: They are different checks, prior checks to this.

The Court: Do you know what happened to the prior checks?

The Witness: I understand, I have been told by our office that those checks were finally honored. I don't know.

The Court: In other words, there were two prior checks [129] given to Mr. Ohlson for turkeys.

The Witness: Yes.

The Court: Do you know how much prior?

The Witness: Possibly a week. I don't know exactly.

Q. (By Mr. Maury): Could it be McKibben, Carter and Lewis' Exhibit A?

A. Very well could be.

The Court: But the two prior checks were given to Mr. Ohlson and finally were paid and cleared the bank?

(Testimony of William B. Brooks.)

The Witness: I don't know. That is my understanding.

The Court: Your testimony is you went out to see Mr. Ohlson, picked up these two checks dated August 13th, and you went over to Mr. McVicker and you picked up his check which is Exhibit 5, dated August 12, is that the one?

The Witness: No. 4.

The Court: This is dated August 8.

The Witness: No. These are the ones that were supposed to have been sent in by special delivery mail by Mr. McVicker.

Mr. Nimocks: I can't hear the witness.

Mr. Maury: Speak up. He said these are the ones supposed to have been sent in by special delivery mail.

The Court: Then you didn't pick up any checks at McVicker's on the 13th?

The Witness: I picked up one check.

The Court: Which one is that? [130]

The Witness: Exhibit 4.

The Court: In the meantime, that check—let me see. Have I got that here? This Exhibit 4 you picked up from McVicker on the 13th and that is the same day you picked up the two Ohlson checks?

The Witness: That's right.

Q. (By Mr. Maury): Is that the first time you had ever picked up any checks at all of Geers or Couch? A. Yes.

Mr. Maury: May these checks be marked Plaintiff's Exhibits next in order?

(Testimony of William B. Brooks.)

The Court: They may be marked Plaintiff's Exhibits 14 and 15.

The Clerk: 14 and 15 for identification.

(The checks referred to were marked Plaintiff's Exhibits 13 and 14 for identification.)

Q. (By Mr. Maury): Calling your attention, Mr. Brooks, to Plaintiff's Exhibit 14 for identification, is that your signature at the lower left there? A. Yes.

Q. Was that executed in your presence by Mr. and Mrs. Ohlson? A. Yes, it was.

Q. Is the same true of Exhibit No. 15 for identification [131] with respect to the McVickers?

A. Yes, that was.

Mr. Maury: I think it has been stipulated that these are the chattel mortgages, your Honor, and I offer them in evidence.

The Court: They may be received in evidence.

The Clerk: Exhibits 14 and 15 in evidence.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 14 and 15.)

Mr. Maury: I think you may cross examine, counsel.

Cross Examination

Q. (By Mr. Nimocks): Do you know, Mr. Brooks, whether this particular check, Defendants McKibben, Carter and Lewis' Exhibit A, passed through your office or through your hands on the way to the home office?

A. Yes. That passed through my hands.

(Testimony of William B. Brooks.)

Q. At or about the date it bears, August 7?

A. Yes.

Q. Then how long was it before you went out and talked to the Ohlsons with regard to the check?

A. Approximately one week.

Q. I hand you Plaintiff's Exhibit No. 3, check given by Charley Geers to McVicker dated August 8, and Plaintiff's [132] Exhibit 5, signed by Charley Geers, dated August 12. I think that you said those were sent in by special delivery, is that correct?

A. That is what Mr. McVicker told me.

Q. He sent them in himself? A. Yes.

Q. You did not see those? A. No.

Q. But the other one did go through you?

A. The other came in my hands and I sent it in personally.

Q. But you waited a week before you went out and talked to Ohlson about not accepting any checks? A. No.

Q. Didn't you just testify it was about a week later?

A. No. At the time I received the first check, Exhibit A, from the Ohlsons, I told them not under any circumstances to sell any more birds to these people without getting express authority from the credit department in Los Angeles, and prior to selling any birds they should call this office collect and get permission.

Q. But you accepted this check and sent it in to the main office? A. Yes.

(Testimony of William B. Brooks.)

Q. On the 13th, had they already received the other [133] checks, Exhibit 1 and Exhibit 2, the one for \$600 and one for \$1,715.75?

A. That is true.

Mr. Nimocks: I have no further questions of the witness, your Honor.

Mr. Geers: May I ask a question?

Mr. Maury: Surely.

Cross Examination

Q. (By Mr. Geers): When you went out to see Ohlson regarding those checks, the one for \$600 and the other one the same day, \$1,715.75, when you went out and talked to him on these two, what conversation did you have with him, do you remember?

A. Yes. At the time that I called on him in regard to these checks, I had already received word that the first check, Exhibit A, had been returned from the bank. When I arrived there, he had sold the balance of that age group of turkeys and he held Exhibit 2 and Exhibit 1, which he turned over to me.

Q. Do you know the difference?

A. Yes, I do.

Q. What explanation do you have of that difference?

A. The check No. 1, Exhibit 1, was made out to C. W. Ohlson, and Exhibit No. 2 is made out to C. W. Ohlson and the [134] Quaker Oats Company.

Q. Did you question that?

A. Yes, I did. Mr. Ohlson told me that he had

(Testimony of William B. Brooks.)

requested Mr. Geers to make out a check to him personally in the sum of \$600, and that he intended to request permission from me or from the credit department of Quaker Oats Company to keep that \$600. The requirements in our contract with the growers call for checks to be made out jointly to the grower and the Quaker Oats Company.

Q. Had he ever grown for you before?

A. Yes, the prior year.

Q. He obtained permission, express permission from you to sell these turkeys the year before, is that right?

A. I don't remember at the time who he sold the turkeys to the year before.

Mr. Maury: Speak up a little bit, please.

The Witness: I don't remember who Mr. Ohlson sold his turkeys to in 1951.

The Court: But you never did give him written authority, but only oral.

The Witness: I have never given anybody written authority. That is the province of the credit department.

Q. (By Mr. Geers): What day were you out there to his place to pick those checks up?

A. It was either the 13th or 14th. I am not sure [135] which.

Q. If it was the 13th, was that the same day that we got the turkeys, we bought the turkeys that morning? By morning I mean from midnight on. Or did he say?

A. I don't remember.

(Testimony of William B. Brooks.)

Q. We bought the turkeys—well, I am out of line on that.

A. It is two years ago. I don't remember.

Q. Could those turkeys have been bought on the 12th? I will put it that way.

A. They could have. I am not sure.

Mr. Geers: That's all. Thank you.

The Court: Any other questions?

Cross Examination

Q. (By Mr. Nimocks): Do you know whether there were in these lots any 11-13, grade B hen turkeys? A. I don't know.

Mr. Nimocks: That's all.

Mr. Maury: Does your Honor have any questions?

The Court: No.

Mr. Maury: That's all.

The Court: May this witness be excused?

Mr. Maury: I think so. [136]

The Court: You may be excused.

(Witness excused.)

The Court: We will now recess until 10:00 o'clock tomorrow.

(Recess.) [137]

Los Angeles, Feb. 25, 1954, 10:00 o'clock a.m.

The Clerk: No. 14690-HW Civil, the Quaker Oats Company vs. John J. Couch, et al., further trial.

The Court: You may proceed.

Mr. Maury: I wish now to call Mr. Wesley Eugene McKibben, one of the defendants in this action, your Honor.

WESLEY EUGENE McKIBBEN

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Wesley Eugene McKibben.

Direct Examination

Q. (By Mr. Maury): What is your occupation, Mr. McKibben?

A. I am a poultry processor.

Q. Whereabouts do you engage in that work?

A. Downey, California.

Q. Is that in this county? A. Yes, it is.

Q. Are you associated with Mr. Carter in that work? A. I am. [138]

Q. That is a partnership?

A. A partnership.

Q. Under what name do you and he do business?

A. We operate under Downey Rabbit & Poultry Company, Downey Poultry Buyers Company, and Country Poultry Market.

Q. Three separate names? A. Yes.

Q. Are there any differences in the work, or are those just trade names?

A. Those are trade names we use in our operations.

(Testimony of Wesley Eugene McKibben.)

tion with John Couch at the time. We had started to write an invoice. Our purchase was from John Couch, and he called us on the telephone and said to make the check payable to Charley Geers.

Q. And you did so? A. We did so. [141]

Q. And Plaintiff's Exhibit 6 is the check?

A. That's right.

Q. Was that a fair and reasonable market price for the birds at that time, sir?

A. I believe so.

Q. You are in the business, are you not?

A. Yes, I am.

Q. If you overpay the market price, what would be the effect on your business?

A. It depends on the transaction.

Q. Of course, but as a general thing, isn't it true you have to know the market price pretty accurately? A. That's right.

Q. The market price is usually a fair and reasonable market price? A. That's right.

Q. That is what you pay, is it not?

A. Yes, sir.

Q. I now call your attention to two checks which your counsel has handed me. They are numbered respectively 26076 and 26077. They are both dated August 6, 1952. I observe an invoice and a weight slip, also. Do these match up as parts of one transaction? A. They do.

Q. What transaction do they evidence? [142]

A. Evidence that we purchased some 600 head of turkeys, hen turkeys, by size, 9,350 pounds at 31

(Testimony of Wesley Eugene McKibben.)

cents a pound, total, \$2,898.50, which was paid in two checks.

Q. One for \$710 and one for \$2,188.50, is that right? A. That's right.

Mr. Maury: May these checks and invoices be marked as one exhibit, and I offer them in evidence, your Honor.

The Court: They may be received and marked Plaintiff's Exhibit 17 in evidence.

The Clerk: Exhibit 17 in evidence.

(The documents referred to were received in evidence and marked Plaintiff's Exhibit No. 17.)

Q. (By Mr. Maury): Can you give any reason why there were two checks issued?

A. On the directions of the seller.

The Court: Who was the seller in this case?

Mr. Maury: Couch.

The Court: Couch?

The Witness: Mr. John Couch.

Q. (By Mr. Maury): Calling your attention now to two checks numbered 26122 and 26123, and to an invoice, all three of which documents are dated August 12, 1952, are those evidence of another transaction? A. They are. [143]

Q. There is also a weight slip attached to the invoice? A. That's right.

Q. What was that transaction?

A. We purchased 210 tom turkeys, 5,390 pounds net, for \$1,563.10, at a price of 29 cents a pound.

Q. And there were two checks given again?

(Testimony of Wesley Eugene McKibben.)

A. That's right.

Q. That was also on the direction of the seller?

A. That's right.

Q. I observe that these checks are made to John Couch.

A. That's right.

Q. I observe that one of them is endorsed by John Couch only, and the other one apparently is endorsed by John Couch and Charley Geers.

A. That's right.

Mr. Maury: We offer these in evidence, your Honor, as Plaintiff's Exhibit 18.

The Court: They may be received as Plaintiff's Exhibit No. 18.

The Clerk: Plaintiff's Exhibit 18.

(The documents referred to were received in evidence and marked as Plaintiff's Exhibit No. 18.)

Q. (By Mr. Maury): Calling your attention now to an additional check, No. 26132, and to an invoice, one of which is dated August 12 [144] and the other of which is dated August 13, 1952, are those part of one transaction, the invoice having another weight certificate?

A. Yes. There is a date on the weight slip of 8-13, and an apparent mistake on the invoice, being 8-12. The bookkeeper had written that date.

Q. It probably would be on the 13th of August?

A. That's right.

Q. This yellow sheet attached hereto is just a duplicate?

(Testimony of Wesley Eugene McKibben.)

A. Just a duplicate or carbon of the weight sheet.

Q. And these documents evidence what transaction?

A. We purchased 310 young tom turkeys, 8,670 pounds, price 29 cents a pound, \$2,514.30.

Q. And the check is in payment thereof?

A. That's right.

Mr. Maury: We offer this as the plaintiff's next in order.

The Court: It may be received as Plaintiff's Exhibit No. 19.

The Clerk: Plaintiff's Exhibit 19.

(The documents referred to were received in evidence and marked as Plaintiff's Exhibit No. 19.)

Q. (By Mr. Maury): Do you have any personal recollection of these transactions [145] or any of them?

A. Only that these turkeys were offered to us by John Couch.

Q. And you bought them?

A. We bought them.

Q. Do you know where Mr. Couch resided at that time?

A. In Riverside.

Q. Did you check any records in Riverside to determine whether there were any mortgages on these birds?

A. No, I didn't, sir. It is not customary.

Q. Did you ask Mr. Couch whether the title was clear and unencumbered?

A. No, I didn't.

(Testimony of Wesley Eugene McKibben.)

The Court: May I ask this witness a question?

Mr. Maury: Certainly, your Honor.

The Court: Do you keep any record as to where these turkeys originate from?

The Witness: Where they originate from?

The Court: Yes. Couch came down with a bunch of turkeys and he offered them to you for sale.

The Witness: Yes, sir.

The Court: Do you know where they came from? San Diego County, Riverside County, San Bernardino County, Ventura County?

The Witness: We don't signify an individual purchase [146] as to what county it might come out of.

The Court: Have you any record to show where these turkeys came from?

The Witness: None other than our purchase record and our knowledge of the transaction.

The Court: Your Exhibit 19 says 310 young tom turkeys.

The Witness: Yes, sir.

The Court: So do you know where those turkeys came from?

The Witness: From John Couch.

The Court: Do you know where he got them?

The Witness: No, sir.

The Court: Is that true in all your invoices?

The Witness: That is true of all of them, yes.

The Court: You never asked John Couch where the turkeys came from?

The Witness: The only conversation I had with

(Testimony of Wesley Eugene McKibben.)

John Couch was at the particular time I bought some deliveries, he had birds that were supposed to be near the weights we needed for our requirements, and from a faint recollection they were supposed to be some toms out of Lancaster area. Other than that, there was no discussion of what town they were coming from, what grower, what milling company they were coming from.

The Court: How long had you dealt with John Couch before [147] August 1952?

The Witness: Off and on for, I think, four years.

The Court: Do you know of your own knowledge where he purchased his turkeys during that four years period of time?

The Witness: He operated throughout Southern California.

The Court: He bought them everywhere?

The Witness: Everywhere throughout Southern California, turkeys and poultry.

The Court: Do you know that of your own knowledge?

The Witness: I know that of my own knowledge, yes.

Q. (By Mr. Maury): After you received a delivery of these turkeys, as to each transaction, what did you do with the turkeys?

A. They were processed, slaughtered.

Q. Picked?

A. Cleaned, eviscerated, packed and sent to a freezer, and sold. I don't know the particular sale involved, but in all probability we had the birds

(Testimony of Wesley Eugene McKibben.)

pretty well spoken for or sold before we bought them. That is our procedure in operation.

Q. Then would you say that they were gone from your possession and control within 30 days after they were purchased by you?

A. Were they out of my control? Not necessarily. They [148] could have been warehoused at Home Ice & Storage. We have cumulative inventory we build up during the early season. We may have commitments to buy from markets or meat sale companies, various people we process for, to buy certain tonnage in the holiday period.

Q. You would say, however, they were entirely slaughtered and made ready for market?

A. They were in public storage, yes.

Q. They were in public storage within 30 days after the date on which you took delivery?

A. Yes. They had to be. Once we dress the product, it is immediately sent to a freezer to be frozen.

Q. You can't keep live poultry, you have to dress it right away?

A. You can hold it a few days, but common procedure is that the turkeys are dressed then.

Q. Did Mr. Couch or Mr. Geers ever tell you that he had made the checks with which he got delivery of this poultry payable jointly to Quaker Oats and the grower?

A. I don't believe he did, sir. It is normal procedure that they do. It is a practice in the trade.

Q. You know it is practice in the trade, but you

(Testimony of Wesley Eugene McKibben.)

didn't ask him on these particular occasions, did you? A. No, sir.

Q. In fact, you didn't discuss any lien on the birds at [149] all, did you? A. No, sir.

Q. Or any mode of payment by Mr. Couch or Mr. Geers for their receipt of the birds?

A. No, I don't believe we discussed it.

Mr. Maury: That will be all. You may examine the witness now or later.

Mr. Nimocks: I would like to ask a couple of questions now.

Mr. Maury: All right.

Cross Examination

Q. (By Mr. Nimocks): You said you had been dealing with John Couch for some four years, is that correct?

A. I believe four years, off and on for four years.

Q. Have there been any occasions where you had difficulty with turkeys he had sold you before?

A. None whatsoever.

Mr. Maury: To which we object, your Honor, calling for evidence outside of the transactions involved here with reference to a man's reputation.

The Court: Do you think there is any question here about this witness being a purchaser for value without any notice?

Mr. Maury: Any actual notice, your Honor, there is no [150] question. It is constructive notice.

The Court: Assuming there is constructive no-

(Testimony of Wesley Eugene McKibben.)

tice, counsel argued yesterday, if I remember correctly, I think you argued yesterday, that inasmuch as the sellers had had some difficulty with the checks, that should have been notice.

Mr. Maury: Notice to whom, your Honor?

The Court: You were talking about the buying of the turkeys, the first two checks that were given. They were finally cleared, but there was some difficulty with them. They were turned down.

Mr. Maury: That wouldn't be notice to this gentleman.

The Court: No, but that witness was allowed to testify.

Mr. Maury: Oh, very well.

The Court: Objection overruled.

Mr. Maury: It is a side matter. It doesn't really matter.

The Court: The objection is overruled. What was the answer?

(Answer read by the reporter.)

Q. (By Mr. Nimocks): Have you or your concern personally dealt with growers in regard to mortgaged turkeys? A. We have.

Q. As to Quaker Oats? A. We have.

Q. Was that before this time? [151]

A. Before this time.

Q. Have you done it since this time?

A. Since this time.

Q. Did anybody from Quaker Oats notify you, give you written consent to purchase those turkeys?

A. We have never had written consent to buy

(Testimony of Wesley Eugene McKibben.)

any turkeys since I have been in business, never.

Q. When was the latest instance in which you bought any turkeys from Quaker Oats?

A. In November this year.

The Court: From Quaker Oats?

The Witness: I bought from the farmer and Quaker Oats held a chattel on the property.

Q. (By Mr. Nimocks): Well, how did you make that pickup?

A. Our dealings were direct with the farmer. We received authorization to buy them verbally from the field man.

Q. In buying these turkeys, Mr. McKibben, approximately how much time elapses from the time of purchase and the time of slaughter?

A. Normal procedure in our operation is that they would be slaughtered either that same day on arrival at our plant or the following day.

Q. Do you ever wait for a time before you slaughter them? [152]

A. We have had occasion to feed turkeys where we couldn't get them all dressed, they were coming faster than we could dress them.

Q. But that is not the normal procedure?

A. No, sir.

The Court: That wouldn't be necessary in August?

The Witness: No. Our turkeys come in pretty heavy through that time of the year, though, and this particular year they were coming heavy in August.

(Testimony of Wesley Eugene McKibben.)

The Court: In August?

The Witness: In August. Production was far ahead of schedule.

Mr. Nimocks: That's all.

The Court: May I ask a question of the witness?

Mr. Nimocks: Certainly.

The Court: How long have you been connected with the turkey and poultry business?

The Witness: 1947.

The Court: That is about six years?

The Witness: Yes. Seven years, February 3.

The Court: Has your connection only been in the buying and the processing of the turkeys?

The Witness: At one time we raised and processed our own commodities.

The Court: Do you know anything about the practice of [153] the feed companies furnishing feed to turkey growers and taking a chattel mortgage on the turkeys?

The Witness: I am aware that they do that, yes, sir.

The Court: Is that a custom in this district?

The Witness: It is a custom in—well, it is a custom in the turkey industry that the feed companies will provide feed, holding the chattel on the commodity.

The Court: According to the evidence introduced in this case so far, the feed company sold or there was sold to the farmer a certain number of poults, 1,000 poults.

The Witness: Yes.

(Testimony of Wesley Eugene McKibben.)

The Court: The farmer was to raise those poults and the farmer gave a mortgage back to the feed company, Quaker Oats Company, to protect them for the purchase price of the poults and for the feed that was used.

The Witness: Yes, sir.

The Court: Is that a customary procedure as far as you know in this locality?

The Witness: It is. I can explain it, if you like.

The Court: I wish you would, if you can.

The Witness: Many of the feed companies will make a tie-up with a hatchery to supply the poults to the farmer. They immediately will pay the hatchery for the poults. They put them on the ranch and then in turn will furnish the feed for that poultry to market time, and in turn they take a chattel [154] on the property until it is sold or paid for.

The Court: Which is recorded?

The Witness: Which is recorded. The knowledge of these recordings or the responsibility of a knowledge in these things is left to the individual buying the commodity in first sale. In other words, we buy product from——

The Court: Wait a minute. Let's go back. I don't understand what you have said.

The Witness: We will take John Couch as an example. He is the buyer of the commodity. So it has been the practice in the trade that whoever bought it should make the check payable jointly to the milling company and to the grower, and you

(Testimony of Wesley Eugene McKibben.)

usually would ask the grower, "Are these turkeys chattel mortgaged?" If he refused to answer, you don't buy them, or you take time to check and see who holds the chattel. The buyer who buys the commodity at that time, the responsibility will usually lay in the hands of the buyer.

Our contacts with the grower would be similar. If we were to make first purchase of the turkeys, we would have responsibility of seeing that the feed company is paid.

The Court: What do you know about the right or the permission given the grower to sell the turkeys?

The Witness: It has always been verbal. The field representative, such as this man that testified yesterday, would contact me as the processor, or Mr. Couch or any of the haulers [155] that buy livestock in the country, operate trucks in the country, tell them here is a particular flock of turkeys to sell, go to work on them. If you establish a satisfactory price or if that individual establishes a satisfactory price with the farmer, they would buy them and haul them to a person processing the commodity. Our business is primarily processing.

The Court: I know what your business is. The hauler goes up to a ranch to buy turkeys. What authority has the grower to sell those turkeys?

The Witness: Verbal from the field man.

The Court: Have you ever seen a written authorization?

The Witness: No, sir.

(Testimony of Wesley Eugene McKibben.)

The Court: Have you ever received a written authorization?

The Witness: I have never received a written authorization, and I have bought lots of turkeys. The only instance of a written authorization was in this last year, a purchase where the commodity was not going to be paid for at the time we picked it up. You can verify this with General Mills. We were storing the commodity for the grower and they gave us directions on how the turkeys would be stored and in whose name they would be stored and retained. Other than that we have never received written authorization.

The Court: When you bought turkeys and paid for them, you never did get a written authorization from the company [156] furnishing the feed?

The Witness: No, sir, and I bought lots of Quaker Oats turkeys through another hauler.

The Court: You bought Quaker Oats turkeys?

The Witness: Yes, sir.

The Court: Did you receive any written authorization?

The Witness: No, sir.

The Court: Did you have any problem with any other hauler than Couch?

The Witness: I have never had any trouble with any hauler other than John Couch.

The Court: All right.

Redirect Examination

Q. (By Mr. Maury): Do you know whether Mr.

(Testimony of Wesley Eugene McKibben.)

Couch or Mr. Geers, either of them, had a license from the State of California to operate as haulers?

A. Do I know whether they did at the particular time of this incident?

Q. That's right.

Mr. Nimocks: Just a moment. I am going to object to that question. You mean licensed as haulers or buyers?

Mr. Maury: Buyers of poultry.

Mr. Nimocks: I don't see that that is material in Mr. [157] McKibben's case. That would be material to the grower.

The Court: What difference does it make?

Mr. Maury: I just want to know what he knew about Couch and Geers.

The Court: I will overrule the objection. We haven't any jury here. I am trying to find out all the facts relative to this case, if I can.

The Witness: To my knowledge, they were operating as licensed buyers.

Q. (By Mr. Maury): That was your understanding?

A. That was my understanding, that they were licensed buyers.

Q. In the course of your dealings with growers, purchasers of turkeys, and so forth, did any of your checks ever bounce?

A. Did any of my checks ever bounce?

Mr. Nimocks: That is immaterial.

The Court: Overruled.

The Witness: My checks have never bounced.

(Testimony of Wesley Eugene McKibben.)

Q. (By Mr. Maury): Your credit is good, is it, Mr. McKibben?

A. It is. The only instance we have had is where there was a failure to have two signatures on the checks, but so far as my checks bouncing, insufficient funds, my checks have never bounced. [158]

Q. You have a high credit rating, do you not?

A. I do, sir.

Q. Do you know whether or not the Quaker Oats Company has a list of approved buyers it hands to its growers?

A. Do I know?

Q. Yes.

A. They wouldn't furnish us one this year.

Q. Let's put it back in 1952. Do you know whether or not you were personally on an approved buyers list with Quaker Oats?

A. I believe I was.

Q. And how about 1953?

A. In 1953?

Q. Yes.

A. Quaker Oats wouldn't provide us on request, they wouldn't give authorization to buy turkeys this year.

Q. Then Quaker does grant or withhold authorization to certain buyers?

A. No, that isn't correct. The Quaker Oats said there was a law suit pending on a 1952 sale of turkeys, and they told a grower that they would rather he didn't do business with us this year after he had completed the sale to us.

Q. But Quaker then does tell the grower whether

(Testimony of Wesley Eugene McKibben.)

to sell to certain processors or not, or purchasers, let us say?

A. Only in this instance that I know of. [159]

Q. You don't know whether or not Quaker maintains a list of purchasers whose credit is good, do you?

A. Well, I would think their credit department would.

Q. You would not think Quaker would grant growers permission to sell chattel mortgage property to purchasers whose credit was no good, would you?

A. They have.

Q. Not on credit.

A. Not on credit, but on the acceptance of a check.

Q. If the check cleared.

A. Well, they have given the verbal authorization to pick up the commodity and take it to market, their field man has, Howard Lindsay has. Many of their field men have.

Q. You personally have no recollection of these transactions, is that right?

A. Other than the fact that John Couch said these turkeys were coming from Lancaster, I have not.

Q. He told you they were coming from Lancaster?

A. Yes. We had a load of fryers that came in about the same time, I think, from Lancaster.

The Court: When you say from Lancaster, what invoice are you referring to, do you know?

(Testimony of Wesley Eugene McKibben.)

The Witness: It would be the latest of the invoices where we purchased toms.

The Court: Let's have the invoices. Can you designate [160] the ones he said were coming from Lancaster?

The Witness: When we are in the market for a particular commodity, many times we will contact a hauler or trucker we know, a poultry buyer, and ask them if they have a commodity in that weight or size to sell us. Well, it would appear to be this item 18 and item 19.

The Court: Those two items?

The Witness: Yes, sir.

The Court: To the best of your recollection, John Couch told you those two items came from Lancaster?

The Witness: Yes, sir.

Q. (By Mr. Maury): How about the transactions evidenced by Exhibits 16 and 17?

A. There was no discussion as to where they came from.

Q. There was no discussion. In each of these instances, all these transactions, were the prices which were paid by you the fair and reasonable market value of the turkeys?

A. They were prices that I established that I would pay. I am a businessman and I try and buy for whatever I feel I can buy for. If the market quotation, for an example, we have a government report that reports the live market at certain values,

(Testimony of Wesley Eugene McKibben.)

and I may try to buy at less or more, depending on my needs.

Q. Is this the government report to which you refer (indicating)? [161] A. Yes, sir.

Q. What is the name of that?

A. That is Market Service News, Federal-State Market News.

Q. Do you rely on that in the trade as an accurate report of market prices for turkeys?

A. Reasonably accurate. It is a report that they compile from calling various poultry houses as to what they are paying.

Q. Do they publish that all year around?

A. Daily publication, five days a week.

Q. Isn't it true there are no quotations for turkeys during the month of August?

A. No, sir, I don't think so.

Q. This is dated September 4, 1952.

A. No, there is a quotation. This is September.

Q. Yes.

A. Well, I don't know. I haven't seen the August market. If you give me the August sheet, I would know.

Mr. Maury: I ask that this be marked for identification.

The Court: It may be marked Plaintiff's Exhibit 20 for identification.

The Clerk: Plaintiff's Exhibit 20 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 20 for identification.)

(Testimony of Wesley Eugene McKibben.)

The Court: I want to ask this witness another question.

The Witness: All right, sir.

The Court: You have here four invoices during the month of August. Are these the only four purchases you made from John Couch or Geers during this period?

The Witness: During the month of August? Are those the only four I have made?

The Court: Yes.

The Witness: I can get my books and check.

The Court: Will you check your books and see if you made any more sales?

The Witness: Purchases, you mean?

The Court: Of either Couch or Geers. I mean purchases, yes.

The Witness: Could I have the invoices?

The Court: Yes.

Mr. Nimocks: Your Honor, what time did you have in mind? Around the dates of the checks?

The Court: During the month of August, early part of August, in there.

The Witness: Apparently that is all I made.

The Court: Just these four sales?

The Witness: Yes, sir.

The Court: Mr. Maury, Exhibit 16 is connected up with Exhibit 6. I think, so far as the testimony is concerned, [163] there is no question that the turkeys that were purchased with Exhibit 6 were turkeys that came from one of these growers. Exhibit 17. The checks are dated August 6. Well, now,

(Testimony of Wesley Eugene McKibben.)

that is before, according to the testimony so far, any contact was made with these growers. The testimony was about August 13th. Your field representative testified it was about August 13th. So Exhibit 17 was for turkeys evidently purchased from somebody before any contact was made with the growers.

Remember I asked Mr. Brooks yesterday very specifically as to the date August 13th. He changed his testimony, you remember, because he testified he had seen one grower first and then he had been down, I believe, to Fontana somewhere and got notice the checks were bad, and he went up and saw the second grower, and then he decided he was wrong, he picked up the two checks at the same time. He was sure it was the 13th or thereabouts. We have got these two checks dated August 6.

Mr. Maury: We have got these two checks dated August 7th and 8th respectively.

The Court: What are you going to do with the testimony of Mr. Brooks? He was very positive as to the 13th.

Mr. Maury: That was the day he first picked up a check from Mr. McVicker.

The Witness: The first checks were mailed.

The Court: You mustn't join in this argument.

The Witness: I'm sorry.

Mr. Maury: The first two checks, as I understand Mr. Brooks' testimony, were mailed in by the grower, and he picked up the third from Mr.

(Testimony of Wesley Eugene McKibben.)

McVicker. The Ohlson checks are dated August 7th and 8th respectively.

The Court: Would you say that these two checks in Exhibit 17 are the first two checks?

Mr. Maury: Well, I prefer to get all the evidence in.

The Court: If you do, the testimony is the first two checks have been cleared.

Mr. Maury: The checks you have in your hand are this man's checks.

The Court: That's right, for the turkeys.

Mr. Maury: That's right.

The Court: If these two checks connect up with the first two checks that Geers gave, those two checks have been cleared and these turkeys have been paid for.

Mr. Maury: Just one of Geers' checks ever cleared.

The Court: We don't have the checks that cleared. The testimony of Mr. Brooks was that Geers had given two checks and he was over here in Fontana and he found out about these two checks that had not cleared and came back, but he said eventually the two checks were cleared, there was some trouble, but they eventually cleared.

Mr. Maury: Whether he knew or not is a question. We have [165] all the checks here.

The Court: I am calling your attention to this so if you want to ask this witness to clarify the matter in any way, you can.

Mr. Maury: I can't ask him to clarify what hap-

(Testimony of Wesley Eugene McKibben.)

pened when he wasn't there. All I can do is put the facts before the court and then argue the matter to the best of my ability.

The Court: Here is the situation. Let's assume, without admitting, let's assume I would render a judgment in favor of the plaintiff here against this defendant. I can't render a judgment against this defendant unless you can establish he got the turkeys.

Mr. Maury: Yes, that's true.

The Court: The fact that Couch sold him some turkeys doesn't mean that the turkeys came from these two ranches.

Mr. Maury: That is true.

The Court: So you have got to establish the turkeys came from the two ranches, the turkeys that this defendant bought.

Mr. Maury: I know that difficulty.

The Court: I am trying to tie up the turkeys.

Mr. Maury: Mr. Geers has testified each of these loads of turkeys he got from the Ohlson and McVicker ranches went to Los Angeles with perhaps a few additions or subtractions, that he went directly in and they were sold for these checks.

The Court: My understanding of Mr. Geers' testimony is [166] that he only made one delivery, brought the turkeys into town, turned the truck over to Couch, and he doesn't know what happened to the turkeys after that.

Mr. Maury: He said they all went to these processors.

(Testimony of Wesley Eugene McKibben.)

The Court: Well, these are the only two processors they dealt with during this period.

Mr. Maury: We will get to that when the case is all in.

The Court: If I find in favor of the plaintiff, I have got to allocate the turkeys between this processor and the other processor.

Mr. Maury: There is a question, too, whether you do or not. These are questions of law.

The Court: I am just calling your attention to the fact that we have got a couple of checks dated August 6th that haven't been tied up as far as I am able to ascertain yet. Don't let me get you off the track.

Mr. Maury: That's all right, your Honor. I appreciate your suggestions very much. I know sometimes these things present tortuous question.

Q. You remember your deposition being taken in my office on the 31st of October, don't you, Mr. McKibben?

A. Yes, sir.

Q. I will hand you my copy——

The Clerk: The deposition has never been filed in the clerk's office. [167]

Mr. Maury: Counsel, has the deposition——

Mr. Nimocks: I was late in returning them.

The Court: You don't deny the deposition was taken? You have no objection to reading the questions and answers to the witness?

Mr. Nimocks: No.

The Court: All right. Read the questions and answers.

(Testimony of Wesley Eugene McKibben.)

Q. (By Mr. Maury): Calling your attention to page 6 of my copy of the deposition, do you remember my asking you:

“Q. Reading from this record which your attorney has handed me, then, it appears that on August 6, 1952, a purchase was made and you gave a check for \$710.00. On the same date another purchase was made and you gave a check for \$2,-188.50.”

A. That’s right.

Q. I asked you, “Now, do you remember that transaction at all?” And did you answer then:

“A. Not to identify it as a particular transaction.”

A. Yes, sir. You know my reason.

Q. Do you remember my asking you the following question:

“Q. Do you remember what member of your force, or of your business personnel, talked with either Couch or Geers at that time?” [168]

A. I answered, “Myself.”

Q. That’s right. Then I asked you, “You talked with him?”

You answered, “Yes.”

A. That’s right.

Q. I asked you, “Do you remember the conversation at all?”

“A. No, I couldn’t say that I remember it. Let me look at it.

“Q. Of course.”

Then I handed the document to you. That is the

(Testimony of Wesley Eugene McKibben.)

document which your counsel has supplied, listing those checks.

A. Only the checks. I did not have the invoices at the time.

Q. Then you answered:

"A. I wouldn't remember anything particular about the transaction without seeing our invoices of purchase, or something on it. I can't honestly say that I remember anything significant about the transaction, except that I bought some turkeys from them."

A. That's right, sir.

"Q. How often had you bought turkeys from Mr. Couch?

"A. I wouldn't know that exactly without [169] examining our records.

"Q. Throughout the year 1952 you had made a number of purchases from Mr. Couch; is that right?

"A. That's right.

"Q. Do you know where his business was located?

"A. I have a Riverside phone number.

"Q. Do you know what that phone number was?

"A. I think the residence number was 9859, Riverside.

"Q. Do you know what his business address in Riverside was? "A. No.

"Q. Do you know what name he did business under? "A. No.

"Q. Did you ever hear of the Park Avenue Poultry Company?

(Testimony of Wesley Eugene McKibben.)

A. After this incident of talking to me on the telephone, some time later in the year I had recognition of the Park Avenue Poultry as an association with John Couch." A. That's right.

"Q. But not before the month of August? [170]

"A. Not prior."

A. That's right.

Q. On line 17, page 8:

"Q. Do you have any recollection of any one of the transactions as distinguished from any others?"

Then Mr. Nimocks interposed, "You are referring to these (indicating)?" And he indicated a list of checks which he had given me.

A. That's right.

Q. I said, "Yes," and you answered:

"Not from the listing that we have here, no.

"Q. Can you tell from those listings how many pounds of turkey you purchased on each of those occasions? "A. No, sir."

Do you remember my asking you on page 9 at line 15:

"Q. Isn't it true that those invoices were required in the State court in Riverside?

"A. The only thing that was required was my testimony in the State court in Riverside."

Do you remember at page 11, line 1, being asked:

"Q. Do you have any recollection one way or the other whether you put them into the hands of the District Attorney in Riverside? [171]

"A. I don't think I did. I think all they took

(Testimony of Wesley Eugene McKibben.)

was my testimony up there. As I remember, we waited six days to testify. I got on the witness stand and was asked if I ever got poultry from Couch and Geers and I said yes. They said, 'During the month of August did you purchase poultry?' I think I said yes, or at least my answer would have been yes. That was about it."

Do you remember being asked that question and giving that answer?

A. Yes. May I say something, sir?

The Court: No, sir, you can't volunteer any information.

Q. (By Mr. Maury): Calling your attention to Plaintiff's Exhibit 16, your invoice dated August 8, Exhibit 17, Exhibit 18, Exhibit 19, can you tell us now which transaction was the one with reference—strike that—as to which of those exhibits did Couch say he got the turkeys from Lancaster?

A. Exhibits 18 and 19.

Q. Exhibits 18 and 19?

A. In a phone conversation only.

Q. In a phone conversation only. Those are the ones dated August 12 and 13, 1952.

A. I didn't have these invoices at the time my deposition was taken, you know. [172]

Q. Just why did you volunteer that statement?

A. Because you tried to prove significance as to the transactions, and all I saw was the check record at the time my deposition was taken.

Q. You had no recollection, then, as to any in-

(Testimony of Wesley Eugene McKibben.)

voice whatsoever last October. What has refreshed your memory?

A. The fact that I am looking at the particular invoices.

Q. You had your check record there at the time?

A. Only a list of the checks that were written and the dates.

Q. Did you sign any of these checks?

A. No, sir.

Q. Are these invoices in your handwriting?

A. They are, sir. This is my handwriting and this is.

Q. 19 and 18.

A. And this is my handwriting.

Q. 17.

A. And this particular invoice is written by my bookkeeper.

Q. Where did Mr. Couch telephone you from, if you know, with respect to Exhibits 18 and 19?

A. From Riverside, sir.

Q. He did?

A. I would presume it was from Riverside.

Q. What did he say in that phone conversation?

A. There was a discussion of buying a particular weight turkey that we needed. I was asked if I could use a particular weight turkey. In dealing with poultry, and especially turkeys, we have a customer demand for dressed weight commodity, and we establish a live weight that we have to have to fill those requirements, and he made reference that he had them, he had turkeys to sell.

(Testimony of Wesley Eugene McKibben.)

Q. He just said he had turkeys to sell. What else was said?

A. I couldn't go into all the fineness of the conversation.

Q. Did you call him or did he call you?

A. I am not sure whether I called him or he called me.

Q. You were the ones that were looking for this particular type?

A. Yes. I would suppose I called him.

Q. Have you given us all that conversation?

A. To the best of my knowledge, I have, sir, that we needed toms and that he had toms to sell. He was referring to these as Antelope Valley. They say Antelope Valley, toms.

Q. Where does it say that?

A. The conversation was John had some toms in Antelope Valley, and that is Lancaster.

Q. Later on turkeys came in? [174]

A. Yes.

Q. And he never said to you, "These particular turkeys I am selling you came from Antelope Valley"?

A. No, sir, he never did.

Q. Do you know who delivered them at your place?

A. John Couch.

Q. Personally?

A. Yes.

The Court: All the turkeys?

The Witness: No, not all the turkeys. There was one load of turkeys where the check was made payable to Charley Geers.

The Court: That is Exhibit 16?

(Testimony of Wesley Eugene McKibben.)

The Witness: Yes. 17, John Couch brought in, 18, John Couch brought in, and 19, John Couch brought in. But Exhibit 16, Charley Geers brought to my plant. There was a phone conversation and I got directions to make the check payable to Charley Geers.

Mr. Maury: You may examine, counsel.

Recross Examination

Q. (By Mr. Nimocks): You testified, Mr. McKibben that at the time of your deposition, you did not have the invoices, is that correct?

A. I did not have them. [175]

Q. Where were they at that time?

A. We didn't know where they were. We had remodeled our building. We thought they were lost or destroyed. Mr. Maury asked me to make every effort I could to find the invoices, which we did.

Q. When did you find them?

A. Three days before the trial.

Mr. Nimocks: No further questions.

The Witness: After going through all our boxes.

The Court: You may step down.

(Witness excused.)

The Court: I notice it's 11:00 o'clock. We will take our morning recess. We will recess now until 10 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Mr. Maury: I will call Mr. Lewis. [176]

ORVILLE ROBERT LEWIS

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Orville Robert Lewis.

Direct Examination

Q. (By Mr. Maury): What is your occupation, Mr. Lewis?

A. Retail poultry operator, store.

Q. Do you do business under the name of Thrifty Poultry Company? A. I do.

Q. And that is where?

A. It is 8907 Atlantic Boulevard in the city of South Gate.

Q. That is in Los Angeles County, California?

A. Right.

Q. Calling your attention to the month of August 1952, did you purchase any turkeys from John Couch or Charley Geers? A. I did.

Q. Your counsel has handed me your cancelled check and invoice, which I hand to you. Is that your cancelled check and your invoice kept in the regular course of business? [177]

A. This is. Do you want to know if this is all there is? I found out we have another one. That is one of the two invoices.

Q. You have another?

A. At the store.

Q. What is the date at the store?

A. August 3.

(Testimony of Orville Robert Lewis.)

Mr. Maury: May this be marked at this time?

The Court: It may be received in evidence as Plaintiff's Exhibit 21.

The Clerk: 21 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 21.)

The Court: You say the second invoice is dated when?

The Witness: August 3.

Q. (By Mr. Maury): Calling your attention to Plaintiff's Exhibit 21 in evidence, can you explain how many turkeys that evidences the purchase of?

A. This calls for 120 turkeys, the weight of 3,384 pounds, at 30 cents a pound. There seems to be a discrepancy in the count of those turkeys, as we mentioned. That is how I come to remember it. There must have been only 110, but we have here 120, and I called Mr. Couch to see why I was short on weight, and we agreed it must have been 110 turkeys. Then there are some B turkeys, B's and turkeys in the amount of [178] 170 head. That would be B chickens and B turkeys at 23 cents a pound.

Q. What is a B turkey.

A. Well, these particular B chickens must be, I don't know, they must be a second-grade fryer and a second-grade turkey.

Q. Then how much did you pay for the turkeys in money at that time?

(Testimony of Orville Robert Lewis.)

A. It states here turkeys, \$1,015.20. We have B's and turkeys for the amount of \$220.17.

Q. Was that the reasonable and fair market price of those birds at the time you bought them?

A. I have no idea.

Q. Aren't you in the business of buying?

A. I am in the business of buying.

Q. Did you make that purchase yourself?

A. Yes.

Q. Do you consider you paid the fair market price?

A. I buy them as cheap as I can, sir.

Q. They were worth at least that?

A. They were worth that to me at the time.

Q. Did you have any conversation with Mr. Couch at the time of that transaction that you remember?

A. Most of the conversation that I remember was after the sale on the turkeys. [179]

Q. By that what do you mean?

A. Well, you see, we bought a turkey that was supposed to average over 30 pounds. I don't remember the conversation at the time of the sale of the turkeys. All I remember is that after we dressed the turkeys, we found that they didn't average heavy enough. So I immediately contacted Couch. I said, "I thought you said these were heavy Antelope Valley or Lancaster turkeys." I said, "They only average 29 pounds."

So then he came back at me and said, "That's right, we sure had 110 turkeys."

(Testimony of Orville Robert Lewis.)

So we had these turkeys loose. We dressed about 40 of them for an order and they weren't heavy enough. I don't know, they either shrunk or they didn't weight it. But I don't remember at the time of the unloading any particular conversation.

The Court: Just a minute. What did you mean when you said you thought these were Antelope Valley turkeys? Why did you say that if you didn't have any conversation about turkeys?

The Witness: Well, I don't remember the previous conversation. We get a better turkey from Lancaster than from the Riverside area, different turkeys, heavier turkeys as a general rule, better broad breast turkey, but I don't remember any of the conversation with Mr. Couch, only what happened after the turkeys were delivered.

The Court: Why did you say to Couch, "I thought you told [180] me these were Antelope Valley turkeys" if you hadn't had any conversation?

The Witness: I presume I must have, but I don't remember it.

The Court: Do you know where these turkeys came from?

The Witness: No, sir.

The Court: Do you know where these fryers came from?

The Witness: They were supposed to be desert fryers, that is what I paid for.

The Court: I am not asking you that.

The Witness: You don't know definitely. They

(Testimony of Orville Robert Lewis.)

were a desert type fryer, because at that time we were paying 32 cents for local fryers and 34 and 35 cents—I am going by records of that month, we paid Ontario Poultry 35 cents for desert fryers and we paid Freedman & Sons 32 cents for local.

The Court: Was this just one truckload?

The Witness: This is a truck pieced out, I mean they were part fryers and part turkeys and part B's.

The Court: All right.

Q. (By Mr. Maury): Do you remember having your deposition taken in my office on the 31st of October 1953? I show you my copy of it, particularly page 4, line 7. Do you remember my asking you:

“Q. Do you, by any chance, have any recollection of anything significant that was said between [181] you and Couch?

“A. After that time?

“Q. At that time.

“A. At the time of the purchase?

“Q. Yes. At the time of the purchase.

“A. Well, I will answer it this way: The turkeys were short weight. That is the main thing that called the thing to my attention.

“We bought the turkeys, say, on a specified date, on Tuesday. We didn't start to dress the turkeys until Wednesday. They were supposed to be a twenty-seven pound average, which would give you twenty-five pound turkeys and twenty-nine pound turkeys. When we went to kill the turkeys, our heaviest turkey was around twenty-three pounds.

(Testimony of Orville Robert Lewis.)

Now, I jumped Mr. Couch, contending that we got taken for some weight. His contention back to me was that we probably had more turkeys in the load than the specified number that we were supposed to have bought to balance out the weight.

"In other words, I don't remember how many turkeys we bought, but assuming we bought 200 turkeys, he claimed there were probably 230 turkeys to make up the loss in weight. That is all the recollection I have on that. [182]

"It was a dispute that came up three or four days or a week after I purchased the load. The load had already been processed. Of course, when we received the load, it was mixed in with another load, but in the whole load I didn't have any twenty-seven pound turkeys.

"Q. How many were mixed in with another load?

"A. In our processing we have a large pen. We had fowl or turkeys in that pen at the time, and unloaded these turkeys with the other turkeys. There is no reason to keep one turkey load separate from another in our place of business."

Do you remember being asked those questions and giving those answers?

A. Yes, but I got my figures transposed. You can see a 27-pound turkey would not dress out 25 pounds. It would lose at least five pounds.

Q. But you corrected your deposition after it was made, didn't you? A. I signed it, sir.

Q. Did you read it before you signed it?

(Testimony of Orville Robert Lewis.)

A. Well, I signed it. I did not read it before I signed it.

The Court: You buy turkeys, not upon the individual turkeys but upon the weight of the turkeys, don't you, the weight [183] of the loads?

The Witness: No. We buy turkeys on the weight of the individual turkey. We will grade turkeys from 28 pounds up and turkeys from 30 pounds up.

The Court: Didn't you weigh the turkeys as a whole?

The Witness: But you feel each individual bird and estimate very swiftly in grading turkeys or grading broilers, and you will know within four ounces or so what any bird weighs when you are unloading. I mean if you are in this business.

The Court: You didn't buy these turkeys for 20-pound turkeys or 30 pounds each, you bought 3,384 pounds.

The Witness: Yes, that was the weight.

The Court: The other invoice, you say that is August 8?

The Witness: August 3, sir.

The Court: Are those the only two transactions you had with Couch?

The Witness: During the month of August or September.

The Court: Had you dealt with Couch before?

The Witness: Yes.

The Court: How long?

The Witness: Three or four years.

(Testimony of Orville Robert Lewis.)

The Court: How long have you been in the turkey business?

The Witness: 32 years. [184]

The Court: Has your experience in the turkey business only been in the buying and dressing and processing of turkeys?

The Witness: Well, I have done everything in the turkey business from hauling them from Texas, I mean in 32 years I have gone the complete circle, I would think.

The Court: What questions do you ask the seller of turkeys as to whether or not they are mortgaged, there is a lien?

The Witness: When we buy from a farmer a flock of any size—smaller flocks we know are not mortgaged, but the larger flocks, if we know the farmer, we ask him and take his word for the fact, whether they are mortgaged or not. If we don't know the farmer, we don't usually buy them.

The Court: The truckers, what do you do about the truckers?

The Witness: We buy the stuff without question.

The Court: Without any inquiry at all?

The Witness: That is the general procedure, unless we are suspicious of the man.

The Court: Are you familiar with the custom in Southern California relating to the sale of poults and sale of feed to the farmers?

The Witness: Right.

The Court: What is that custom? [185]

(Testimony of Orville Robert Lewis.)

The Witness: I would say 90 per cent of the large flocks are owned by feed companies.

The Court: Are owned by the feed companies?

The Witness: I mean through the mortgage.

The Court: You mean through the mortgaging to the feed company? They are mortgaged to the feed company?

The Witness: Right.

The Court: Have you ever been given a written authorization to buy any turkeys from a feed company?

The Witness: It is a practice that does not exist. It is asked for, but never has been carried out.

The Court: Who has the authority to sell turkeys?

The Witness: Customarily the man that raises them is the one that sells them. I never bought anything from a feed company direct unless it was a foreclosure, of which I have had a lot. I mean they would foreclose on the mortgage.

The Court: When you go out to buy turkeys from a farmer, do you ask to see any written authorization to sell the turkeys?

The Witness: I never, and I bought lots.

The Court: You just buy them from the farmer.

The Witness: Just buy them from the farmer and make the check to the feed company and the farmer and go on.

The Court: That has been your experience?

The Witness: That has been the procedure for the last 30 [186] years.

(Testimony of Orville Robert Lewis.)

The Court: All right.

Q. (By Mr. Maury): Do your checks bounce?

A. Do my checks bounce?

Q. Yes, sir.

A. I have a statement I can bring up here for \$11,000 overdraft on my bank statement. I wouldn't think I would have much over that.

Q. The bank will meet your checks?

A. They can give up to \$15,000 on overdraft.

Q. Your credit is good?

A. My credit is good. I have had checks bounce.

Q. But not for not for sufficient funds.

A. Yes, but years ago. 32 years is a long time.

Q. Let's say in the last five years.

A. No, not the last 10.

Q. There was a depression in the 30s, remember.

A. I have had checks bounce just like Mr. Couch.

Q. But on this custom you speak of, it is customary for the checks to be paid at the bank, too, is it not? A. My checks?

Q. All checks in the industry.

A. Well, I was in a creditors meeting less than two years ago where there was over \$30,000 checks issued to farmers and feed companies that were brought in at a creditors' [187] meeting over a period of time and they were bad checks.

Q. What would that be in percentage of the checks given in the industry?

A. Oh, the man over the same period had prob-

(Testimony of Orville Robert Lewis.)

ably bought \$250,000, of which \$30,000 was bad checks.

Q. That was just one man?

A. Just one man, just one instance.

Q. Do you know how many dollars worth of turkeys are produced in the Southern California area annually?

A. No. I could look at my files; but there are millions of dollars worth.

Q. Do you know of any custom or usage in the trade, the turkey industry, that checks are accepted as payment whether or not they are good checks?

A. Well, it is customary when I give the farmers a check payable to the feed company and the farmer for him to in turn turn that over to the feed company as a payment on his bill, which naturally he is given the same form of credit on it as in a bank deposit. They wait until the check has cleared, I mean they don't take a check as currency anyhow whether it is in the feed business or anywhere else. I mean the check has to be good.

Q. The check is not considered payment unless it is good?

A. Not in any line I have ever seen. [188]

Mr. Maury: That's all.

The Court: Any questions?

Mr. Nimocks: Yes, your Honor.

Cross Examination

Q. (By Mr. Nimocks): Mr. Lewis, I think you

(Testimony of Orville Robert Lewis.)

stated you have been in the business 32 years, is that correct? A. Right.

Q. You also stated during part of that 32 years, you were a hauler?

A. Yes. I still have trucks. In fact, I had three trucks in the country last year.

Q. Were you in approximately the same type of business John Couch and Charley Geers were in that sense? A. Yes.

Q. A huckster is the term commonly applied?

A. Yes.

Q. During the time you were so hauling, were these practices that have been described here used at that time?

A. Ever since I have been in business.

Q. Approximately how long were you a huckster?

A. 20 years. I had a retail store, but I bought from the—it was a combination business.

Mr. Nimocks: That's all. [189]

The Court: You said you had three trucks in the country last year. Did you have any trucks in 1952?

The Witness: Oh, yes. I don't know how much turkeys I bought.

The Court: How many trucks did you have in 1952?

The Witness: I had two available trucks at that time.

The Court: Did you buy turkeys or did some of your employees buy turkeys from the farmers in 1952?

(Testimony of Orville Robert Lewis.)

The Witness: Yes, sir.

The Court: When you went up to a farmer to buy turkeys, who sold the turkeys?

The Witness: The farmer.

The Court: Did you ever see any written authorization that he could sell turkeys?

The Witness: I never even contacted a feed man.

The Court: You never contacted a feed man?

The Witness: I just bought the turkeys from the farmer and made the checks payable by the hundreds to the farmer and the feed man. I never contact the feed man.

The Court: Supposing the farmer doesn't tell you the turkeys are mortgaged to a feed company?

The Witness: Make out the check to the farmer, if you know the farmer.

The Court: If you know the farmer?

The Witness: Yes. I mean I would have no reason to [190] doubt the farmer I have known for six years. There is one man I buy from all the time and he buys from a feed company, I presume. He pays his bills.

The Court: Have you bought from any farmers financed by Quaker Oats Company?

The Witness: Yes.

The Court: And you bought from the farmer?

The Witness: Directly from the farmer.

The Court: Did the Quaker Oats Company ever tell you you couldn't buy direct from the farmer?

The Witness: No.

The Court: Did Quaker Oats Company ever tell

(Testimony of Orville Robert Lewis.)

you you had to have written authorization to buy?

The Witness: No. I bought Quaker Oats feed but I never had any other dealings with them. My checks will say "Quaker Oats Company," that's all. A check that is made for poultry is to some farmer and Quaker Oats Company, or some farmer and Purina Feed Company, or some farmer and some other company.

The Court: I have no further questions.

Redirect Examination

Q. (By Mr. Maury): Your credit is good?

A. I have got a good credit rating.

The Court: If the bank is carrying him for \$15,000, it [191] is more than the bank will do for me. They won't carry me for \$15.

The Witness: I have been 32 years with the same bank.

Q. (By Mr. Maury): Do you know of any list which Quaker has of buyers who are entitled to buy——

A. I have never seen one.

Q. Excuse me. Let me finish. ——entitled to buy without direct permission from Quaker as to the transaction?

A. I have never seen one.

Q. You have never seen one?

A. I did do this this year. I called some big feed company when I started to buy and gave them my bank reference, told them to look me up, and if the farmer wanted to call in, it is customary for the farmer, if he is selling his merchandise, he doesn't even figure it is Quaker Oats merchandise,

(Testimony of Orville Robert Lewis.)

so when he goes to sell to me, if he doesn't know anything about my financial condition, it is much easier for him to call the feed company he deals with and ask them what the financial condition of this particular person is. In that way I think that the feed companies can investigate, and so in turn I called up the feed companies this year and told them to look up my credit with Dun & Bradstreet and the Bank of America, and if the farmer wanted to question me, I would tell him to call the feed company.

Mr. Maury: No further questions. [192]

Mr. Nimocks: No questions.

The Court: You may step down.

(Witness excused.) [193]

Mr. Maury: I will call Mr. McVicker.

HARRY McVICKER

called as witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand, please? Will you state your name?

The Witness: Harry McVicker.

Direct Examination

Q. (By Mr. Maury): Where do you reside, Mr. McVicker? A. California.

Q. In what county? A. Riverside County.

Q. You are acquainted with Charley Geers?

A. Yes, sir.

(Testimony of Harry McVicker.)

Q. When did you first meet him?

A. Oh, 1952, week of August 8.

Q. Where? A. At my ranch in Nuevo.

Q. Do you see him in the court room here?

A. Yes.

Q. What do you raise on your ranch?

A. Turkeys. [194]

Q. Did you have a conversation with Mr. Geers at that time?

A. Yes. He came to the ranch and wanted to buy the turkeys. He said, "I bought some of Ohlson's turkeys." So we had a little conversation.

He said he saved a little money and went in partnerships with Johnny Couch and was buying turkeys.

So I said, "Okay." I had another fellow, a prospect, and I said if he doesn't show up, then you can come back in a day or so and I will sell them to you, let you have them."

Q. Did he come back? A. He did.

Q. When was that that you first met him?

A. The 8th.

Q. The 8th?

A. No. It may have been a couple of days before that. I just don't remember, but it was within a week's time there.

Q. Now, calling your attention to Plaintiff's Exhibits 3, 4, and 5 in evidence, are you familiar with those documents? A. Yes.

Q. What is Exhibit 3?

A. What do you mean by what is it?

(Testimony of Harry McVicker.)

Q. Did you get that from Charley Geers? [195]

A. Yes.

Q. What day? A. The 8th of August.

The Court: Will you keep your voice up?

Q. (By Mr. Maury): Yes, will you, please? Everybody has to hear you. Is that your signature on the back of this? A. Yes, sir.

Q. What did you give to Mr. Geers in exchange for that? A. Turkeys.

Q. Do you know how many?

A. I just don't remember the number of them, no.

Q. Do you have any record of the poundage?

A. Mr. McCall, the State officer, has all that data.

Q. What office of the State is he with?

A. State Marketing Board.

Q. Of the State of California? A. Yes.

Q. You turned those records over to him?

A. That's right.

Q. When was that?

A. That was when there was the court session in Riverside.

Q. Calling your attention to this Plaintiff's Exhibit No. 4, did you receive that from Charley Geers?

A. This is on the 13th, wasn't it? There is one check [196] here that I don't remember, that is the last check I got was from Johnny Couch himself, that is why I don't remember. I believe this last

(Testimony of Harry McVicker.)

one, the last dated check I got from Johnny Couch, we will put it that way.

Q. The last dated check is the one you have before you? A. Yes, that is it.

Q. August 13th? A. Yes.

Q. He handed that to you in exchange for what?

A. Turkeys.

Q. The same records were kept as to those turkeys, and were they also given to Mr. McCall of the State department? A. That is right.

Q. Can you tell from the amounts of those checks approximately how many turkeys were involved in each of the transactions?

A. According to your price here, that is, it was 29 cents for toms, that would take a little while to figure it out, the number that was there.

Q. Was that the price you were paid?

A. I was paid, yes.

Q. 29 cents? A. That's right.

Q. Then it is a matter of simply dividing the numbers on these checks, the dollars and cents on these checks? [197]

A. By the poundage, but you have to have the weight slip, too.

Q. What became of the weight slip?

A. Mr. McCall has those.

Q. But you could determine the exact number of pounds, is that right?

A. According to the weight, yes.

Q. The weight comes from a public scale?

A. That's right.

(Testimony of Harry McVicker.)

Q. And 29 cents, you know that was the price you were paid?

A. That was for toms, I believe.

Q. And how much for hens?

A. I think it was 31 or 33, I just forget.

Q. Do you know whether you sold toms or hens at this time in August? A. I sold both.

Q. Do you know how many of each?

A. No, I don't just remember how many there was.

Q. Calling your attention to Plaintiff's Exhibit 3 in evidence, for \$1,432.20, can you tell whether or not that was toms or hens, or a mixture?

A. 1400—I really couldn't say. I would have to have the weight slip to figure it out.

Q. Would there be any duplicate weight slip at the [198] scales? A. Yes, there would.

Q. Is the same true of Plaintiff's Exhibit 5?

A. That's right.

Q. And of Exhibit 4? A. That's right.

Q. When you first met Mr. Geers, will you tell us the full extent of the conversation you had with him?

A. Well, he came to my ranch and said he bought Ohlson's turkeys and he would like to buy mine, he saved a little money and went in partnerships with John Couch and was buying turkeys. That was all.

The Court: Did you know John Couch?

The Witness: No, sir.

(Testimony of Harry McVicker.)

The Court: The name didn't mean anything to you?

The Witness: No, it didn't. It does now, though.

The Court: At that time.

The Witness: No.

Q. (By Mr. Maury): That was the first time you met him and that was all that was said at that time? A. That's right.

Q. When did you meet him again?

A. Well, on the date these checks are made out, on the 8th, and this is the last one Couch individually, he came by himself this time. I don't know whether this is the 14th or [199] the 12th, I don't know which. I can't see it here. I met Mr. Geers on three different occasions within a week.

Q. Was Mr. Geers present on the occasion of your receiving that check from Couch?

A. No, he was not.

Q. He was not present at that time?

A. No.

Q. Couch came that time alone, is that right?

A. That's right.

Q. But Geers came the first time?

A. Yes.

Q. After you got those checks, or during the second visit when you were given the first of the checks, on August 8th, what conversation was had at that time?

A. Very little. I don't believe there was hardly any conversation, just loading turkeys, and that was it.

(Testimony of Harry McVicker.)

Q. Just loading turkeys, and he gave you the check? A. That's right.

Q. Where did the information concerning Quaker Oats come from on that check?

A. Oh, as a general rule when I sell, Quaker Oats always had their name put on the check and my own.

Q. Did you have any understanding with Quaker Oats concerning selling the turkeys that way?

A. Well, no, I never had no trouble with Quaker Oats [200] selling turkeys.

Q. I said understanding.

A. Not to my recollection, no.

The Court: May I ask a question?

Mr. Maury: Certainly.

The Court: How long have you been raising turkeys?

The Witness: Seven years.

The Court: Have you dealt with Quaker Oats before 1952?

The Witness: Yes, sir.

The Court: Quaker Oats has always had a mortgage on the turkeys, have they, for the turkeys and the feed?

The Witness: Yes, sir.

The Court: Every year, you have sold the turkeys as the poults would grow up and mature?

The Witness: Yes, sir.

The Court: Did you ever have any written authorization from Quaker Oats that you could sell turkeys?

(Testimony of Harry McVicker.)

The Witness: No, sir, I didn't.

The Court: You just sold them to the buyers as they came along?

The Witness: That's right.

The Court: Then you notified the Quaker Oats that they had been sold and sent the money to them?

The Witness: I did not notify them first. I sent the money first. [201]

The Court: You sent them the money?

The Witness: That's right.

The Court: As far as Geers is concerned, you just followed the custom that had been established for several years, you sold the turkeys, took the check, and sent it to Quaker Oats, is that right?

The Witness: That's right.

The Court: Just a minute. I notice Exhibit 13, which is a turkey growers agreement, supposed to have been signed by you, specifically says, "Grower shall not sell, encumber, or otherwise dispose of said turkeys without the prior written consent of Quaker."

The Witness: Yes, sir. Well, it isn't strictly enforced that way. I don't know how to explain it.

The Court: But you never did get a written consent?

The Witness: No, sir, I did not.

The Court: And you sold your turkeys from year to year?

The Witness: That's right.

(Testimony of Harry McVicker.)

The Court: And Quaker never objected up to this particular time to your selling the turkeys?

The Witness: That's right.

Mr. Maury: May I have that exhibit, your Honor?

The Court: Oh, certainly.

Q. (By Mr. Maury): This is your signature, isn't it, Mr. McVicker, on Plaintiff's Exhibit 13?

A. Yes, sir.

Q. And your wife's? A. Yes, sir.

Q. You read it before you signed it?

A. That's right, sir.

Q. You are familiar with this clause 5, are you not? A. Yes, I am.

Q. "Grower shall not sell, encumber, or otherwise dispose of said turkeys without the prior written consent of Quaker and the proceeds of any sale consented to in writing by Quaker shall be payable jointly to grower and Quaker."

A. That's right.

Q. "Any such proceeds in excess of the amounts of money due Quaker hereunder to be refunded to grower." A. Yes.

Q. Have you received refunds from Quaker?

A. When was this?

Q. For money over and above the moneys you owed Quaker? A. No, I haven't.

Q. You never have. When you have sold turkeys, what have you done, accepted checks?

A. Yes, sir.

Q. From just anybody?

(Testimony of Harry McVicker.)

A. Well, it looked like legitimate business to me over [203] a period of seven years, and I have dealt with Quaker for five years now. I don't know. I just went ahead and sold each year and there never was no trouble but this last year.

Q. The year before last?

A. The year before last, yes.

Q. In other words, all the other checks you took were good, is that right?

A. That's right.

Q. You are acquainted with Mr. Brooks?

A. Yes.

Q. At about this time did you have any conversations with him? A. No, I didn't.

Q. Didn't he call over and get one of the checks?

A. Yes, that's right.

Q. What did he say at that time?

The Court: Just a minute. Prior to the sale to Geers, you had no conversation with Mr. Brooks?

The Witness: No, I didn't.

The Court: But after the sale, you did?

The Witness: Right after.

The Court: All right.

Q. (By Mr. Maury): What was said at that time by him and by you?

A. Well, I received the checks back that there wasn't [204] sufficient funds there in the bank, so Brooks picked them up, and that was it.

Q. What do you mean by "that was it"? He just took them along with him?

A. That's right.

(Testimony of Harry McVicker.)

Q. What did he say he was going to do with them?

A. Turn them in to Quaker Oats.

Q. How do you know there was insufficient funds in the bank at that time?

A. He had picked the two checks up that I had previously sold and took them in.

Q. That was the first two checks had been sent in by you to Quaker? A. That's right.

Q. And the third one, he came out and picked it up, is that it? A. I think he did.

Q. At that time did he tell you that the first two were refused by the bank?

A. That's right.

Q. What else was said, if anything?

A. I just don't remember what was said then. That was the finish of the turkeys. That was the last check.

Q. Have you ever received payment for those checks? A. No, I haven't. [205]

Q. Have you ever received any credit on the books of Quaker for those checks?

A. Not that I know of.

Q. Has Quaker ever given you any statement showing those checks have been paid?

A. No.

Q. Did you part with the turkeys before you got the check or at the same time?

A. At the same time.

Q. At the same time in each instance?

A. That's right.

(Testimony of Harry McVicker.)

Mr. Maury: I think you may cross examine.

Cross Examination

Q. (By Mr. Nimocks): Mr. McVicker, with reference to Exhibit 3, the check for \$1,432.20, where was that check delivered to you?

A. At Dan's Feed Store in Perris, California.

Q. What disposition did you make of it at that time, if any? A. What do you mean?

Q. What did you do with it?

A. I sent it to Quaker Oats.

Q. Immediately?

A. That's right, that same morning. [206]

Q. Plaintiff's Exhibit No. 5 made out in the amount of \$1,490.60, dated August 12, that was received by you where?

A. Dan's Feed Store at Perris.

Q. Did you also mail that immediately to Quaker Oats?

A. Well, I couldn't say for sure, because I think Mr. Brooks picked up one of the checks.

Q. Would you say he picked the first one up or the second one, do you know?

A. I don't really know.

Q. The one you mailed, where did you mail that? To Mr. Brooks or Quaker Oats?

A. Quaker Oats.

Q. Where? Los Angeles?

A. Los Angeles.

Q. Approximately how long after the check was mailed was it Mr. Brooks came out to see you?

(Testimony of Harry McVicker.)

A. Oh, the following week, I think it was.

Q. At that time do I understand your testimony to be that one of the checks had returned, or two of them had? A. Say that again?

Q. The first time you saw him was anything said about these checks? Had one of the checks or two of the checks returned at that time?

A. No. The following week he comes out and he told me they had been returned, they wasn't any good. [207]

Q. The first time you saw Mr. Brooks after you received this first check, where was that? Where did you see him? A. At my ranch.

Q. Was there any discussion with regard to these turkeys?

A. No, not that I remember.

Q. Was there any discussion with regard to the fact that you had sold certain turkeys to Charley Geers? A. No.

Q. There was nothing that had to do with this transaction at all?

A. I don't believe so, no.

Q. Later he came out with one or two checks which he said had been returned of Charles Geers, is that correct? A. That's right.

Q. Approximately how much time elapsed between the time you first received the check, the first check, and the time Mr. Brooks brought the check out to you?

A. I couldn't say. Probably 10 days, two weeks.

(Testimony of Harry McVicker.)

Q. Was it before or after you received Plaintiff's Exhibit No. 4, dated August 13?

A. It was after.

Q. It was after that. When he came out, he brought the first two checks back, is that correct?

A. I just don't remember whether that was the first [208] two, but they weren't any good, anyway. There was two checks he brought out and said they were no good, and then maybe a week later I got the others in a telegram from Quaker Oats.

Q. As to this third check, the later check, No. 4, dated August 13, what did you do with that check?

A. I sent it to Quaker Oats Company.

Q. In Los Angeles? A. Los Angeles.

Q. Is Plaintiff's Exhibit No. 5, the one dated August 12th, is that the only one you delivered to Mr. Brooks?

A. I couldn't say for sure which one he got.

Q. You have testified Plaintiff's Exhibit No. 3, the one dated August 8, you mailed in to Quaker Oats, and you have also testified Plaintiff's Exhibit 4, the one dated August 13, was mailed to Quaker Oats, Los Angeles? A. Yes.

Q. You said you delivered one to Mr. Brooks?

A. Yes.

Q. That was the one, No. 5, on the 12th, then, is that correct? A. Yes.

Q. Approximately how many turkeys did you have out there, Mr. McVicker?

A. I don't just remember the number.

Q. Can you approximate it? 200 or 2,000? [209]

(Testimony of Harry McVicker.)

A. Well, no, it wasn't 2,000. I just don't remember how many there was there.

Q. You had bought certain turkeys under the mortgage which you had given to Quaker Oats, is that correct? A. That's right.

Q. Approximately 1600 all told?

A. Probably around that, yes.

Q. Up to the time you sold these turkeys to Mr. Geers, had you sold any to anybody else?

A. No.

Q. By the time you finished these transactions with Mr. Geers and Mr. Couch, did you have any turkeys left? A. No, I didn't.

Q. Did you have any other kind of poultry or produce? A. No.

Q. Didn't have any checks? A. No.

Q. What is a B turkey?

A. Well, in the retail business they grade them back. I don't know. It isn't up to their standards. I wouldn't know very much.

Q. Would you recognize a B turkey if you saw one?

A. Well, I could name all the alphabet of them, but I wouldn't specifically say I could point out a B turkey. That is for the retail man and processor to figure out. [210]

Q. Is there a general distinction of a B turkey from any other kind of turkey? Is it different in weight or age? A. It could be.

Q. Take the sale you made to Mr. Geers Au-

(Testimony of Harry McVicker.)

gust 8th. Do you recall whether those were all hens or all toms or mixed, or what was the situation?

A. I believe they picked up the toms first.

Q. Did that first delivery take all the toms?

A. I don't believe it did.

Q. Then the second delivery was made, apparently, on August 12th, as evidenced by Mr. Geers' check dated August 12th. Do you recall whether that was all toms or all hens or mixed?

A. I don't know whether it was all toms or not. It has been so long ago, I have just forgotten, but I know they picked the turkeys up. In what way they went, I don't remember.

Q. I think you have already said you thought they picked up the toms first.

A. That's right.

Q. If they picked up all the toms in the first delivery, you don't recall? A. I don't.

Q. You are positive the second delivery included both hens and toms? [211] A. It could be.

Q. As to the third delivery, you think that was all hens? A. I believe so.

Q. You have stated you received, as you recall, 29 cents a pound on the toms and 31 cents a pound on the hens. A. That's right.

Q. Is that true as to all three deliveries or just one of them or two of them?

A. To the best of my memory, yes.

Q. You received a uniform price of 29 cents on the toms?

A. I believe so. I believe that was the price.

(Testimony of Harry McVicker.)

Q. Do you recall approximately how heavy the hens were on the average?

A. I imagine about a 15-pound average.

Q. What about the toms?

A. Oh, maybe between 27, 28.

Mr. Nimocks: I have some more questions, your Honor, but it is 12:00 o'clock.

The Court: May I inquire, Mr. Maury, how many more witnesses you have?

Mr. Maury: I have Mr. Ohlson and probably will put on a representative of Quaker Oats this afternoon and that will close the case. [212]

The Court: And how many witnesses do you have, Mr. Nimocks?

Mr. Nimocks: Four, two defendants and two other witnesses.

The Court: The defendants have already testified.

Mr. Nimocks: There are some other matters I want to bring out which weren't within the scope of the direct examination when they were on the stand before, your Honor. The examination should not be very long.

The Court: Can we finish the case this afternoon?

Mr. Nimocks: I hope so. I have six hearings set for tomorrow.

The Court: Maybe we'd better come back at 1:30. Is that all right.

Mr. Maury: Certainly.

The Court: We will recess until 1:30. [213]

Los Angeles, Feb. 25, 1954, 1:30 o'clock p.m.

The Court: You may proceed.

HARRY McVICKER

the witness on the stand at the time of recess, having been heretofore duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Nimocks): Mr. McVicker, in these loads of birds you sold to Charley Geers, I think I asked this question and I don't think you answered it, were there any B turkeys?

A. Well, not in my opinion, there weren't.

Q. What was the approximate age of these birds, do you recall? A. Oh, about 29 weeks.

Q. Were they fully matured?

A. They are supposed to be, if they aren't.

Q. I am asking about these particular birds. Were they?

A. As far as I am concerned, they were, yes. Finished, in other words.

Q. As I recall, you said you had been in this business for about seven years; is that correct?

A. That's right.

Q. Do you know what disposition ordinarily is made of these birds once you sell them to a huckster or processor?

A. They have grades they go by.

Q. I mean do you know what is done with the birds?

(Testimony of Harry McVicker.)

A. They are sold to a dresser, processor.

Q. Do you know in the ordinary course of business approximately how soon those sales are made?

A. That is by the processor?

Q. No. If you sell to a huckster, do you know in the ordinary course of business that he sells to a processor? A. Yes.

Q. On occasions you might sell directly to the processor, is that right? A. That's right.

Q. Ordinarily in the sale of that type, do you know approximately how long it is before those birds are processed? A. No, I don't.

Q. You have not been around any of these processors' plants to know?

A. No, I don't know.

The Court: I will take judicial knowledge that they are not going to keep turkeys cooped up any longer than is necessary. They take them down and sell them, get rid of them as soon as possible. [215]

Mr. Nimocks: Thank you. I have no further questions.

Mr. Geers: May I ask a question?

The Court: Yes.

Cross Examination

Q. (By Mr. Geers): Those checks we were talking about, did they come back to you marked not sufficient funds?

A. I don't believe they were marked not sufficient funds.

(Testimony of Harry McVicker.)

Q. How did you have knowledge of the fact that there was no funds there to cover them?

A. As far as I know, they were no good, so otherwise I took my own judgment that there were no funds then to make them good.

The Court: Just a minute. Did the checks come back to you or to the Quaker Oats?

The Witness: The Quaker Oats sent me the cancelled checks.

The Court: But you don't know what was on them when the Quaker Oats Company got them?

The Witness: No, I don't know, no.

Mr. Geers: I think two of them there still have the tab on, "referred to maker," rather than not sufficient funds.

The Court: That's the best evidence. The checks are the [216] best evidence.

Mr. Geers: These checks are——

The Court: Let's not argue that. Let's get in the testimony. I want to get the testimony in.

Q. (By Mr. Geers): There is Exhibit 5. What does that say is the reason the check is returned?

A. As far as my knowledge is concerned, this wasn't on here.

Q. That is on every check that comes back from the bank, I think. There is a place there to be marked.

A. It may have been, but I don't remember seeing it on there.

(Testimony of Harry McVicker.)

The Court: Well, this is the best evidence of what it was returned for.

Q. (By Mr. Geers): Did you have any discussion with Quaker Oats or any representative or agent of theirs regarding the sale of your turkeys to John Couch or myself?

A. Yes. I sold the first load to you and then Brooks came along and said, "Get your checks in to the Quaker Oats." That's all that was said.

Q. Your checks were already in, though, weren't they? A. That's right.

The Court: After you sold the first load, Mr. Brooks came around to see you and he said, "Get your checks in." Did he mean the checks for the birds that were already sold or the [217] birds that were to be sold?

The Witness: The birds that were already sold. He says, "Get your checks in."

Q. (By Mr. Geers): Did you call me on the phone any time prior to buying those birds?

A. No, I didn't.

Q. Did you have more than one grade or size of turkey? I think that question has been asked.

A. That's right.

Q. Did you?

A. As far as I am concerned, no.

Q. Had you had any illness in your flock that year? A. Any what?

Q. Illness, sickness?

A. Not that I know of, no.

Q. Did you sell us some cull birds?

(Testimony of Harry McVicker.)

A. No, no culls.

Q. We didn't clean up all that you had around there?
A. That's right, you did.

Q. Tell me, Mr. McVicker, and this is your own personal knowledge, not what they told Mr. Ohlson or anyone else, did they explain that contract you signed in its entirety, each line of it?

A. I am aware of the contract, yes.

Q. Did they explain it to you when you signed it? [218]
A. Your field man explains it.

Q. He goes through it all the way?

A. That is true.

Q. What did he tell you specifically when you signed up the first time with regard to selling?

A. The turkeys?

Q. Any turkeys.

A. As I understand, the lawyer has just shown me a contract I signed and that was it, "without written permission."

Q. You didn't follow the contract, did you, when you sold them?

A. That's right, I didn't, as far as that is concerned.

Q. Getting back to the checks, how much time elapsed, would you say, before they were returned to you from Quaker Oats Company, about what date?

A. Oh, I couldn't say truthfully. Maybe a week or 10 days, somewhere around there.

Q. The bank balance we have, and this is the

(Testimony of Harry McVicker.)

best evidence that we have right there, it is marked Exhibit A——

The Court: This witness doesn't know anything about that balance. You are not supposed to argue with the witness. He can only testify to facts he knows.

Mr. Geers: May I put it this way, this bank balance states the date those checks were written that the amount was in there. [219]

The Court: Well, this witness doesn't know a thing in the world about that.

Q. (By Mr. Geers): May I ask you this. If you were doing business with any bank and you get your bank statement at the end of the month and it showed a balance of \$500, or any other amount, wouldn't you assume you had that much money in the bank as of that date?

Mr. Maury: The defendant is arguing the case, your Honor, with the witness.

The Court: That's right. That is purely argument.

The Witness: That isn't my line. I am growing turkeys.

The Court: He is a turkey grower, not a banker.

Q. (By Mr. Geers): Mr. McVicker, I have two checks, Exhibits 3 and 4, here is one of them, and both of them bear my signature. You accepted both those checks. Tell me, would you say by looking at those checks they were one and the same?

A. I am no expert on handwriting.

Q. I realize that.

(Testimony of Harry McVicker.)

A. As far as that is concerned, I wouldn't say yes or no.

The Court: He can't testify to that.

The Witness: What have I got to do with this? What difference does it make whether I say this is this or this is that? Does that prove anything to me? I haven't got the money, so why should I answer a question like that? [220]

Q. (By Mr. Geers): Did the price we were paying look more attractive to you than what you had been offered?

A. No. You people are according to Hoyle with the rest of the people.

Q. Were you in pretty close contact with Mr. Ohlson at this time?

A. What do you mean?

Q. During this period of time when you were doing business with us.

A. He is a neighbor of mine.

Q. I mean did you discuss the price that we were paying and so on with him?

A. Naturally I would ask him how much you were paying.

Q. I have just one more thing to say. At the time you sold us these turkeys, if you hadn't thought it was okay with Quaker Oats to sell them to us, would you have gone through with the transaction?

A. If I hadn't thought it would be okay?

Q. Yes.

A. Sure, I wouldn't. If it wasn't okay with

(Testimony of Harry McVicker.)

them, if I had the belief it wouldn't be, I would have not sold them, no.

Q. In your belief, it was okay with the Quaker Oats to sell us those turkeys?

A. As far as my mind let me go, yes.

The Court: Any other questions? [221]

Redirect Examination

Q. (By Mr. Maury): You didn't expect to sell turkeys for bad checks, though, did you?

A. No, I did not. In a way, maybe the man is innocent, I don't know, but as a general rule we try to do legitimate business. That is where your written contract comes in which has been talked about which isn't enforced to a certain extent. It is more taking it for granted that a man is good.

Q. Have you ever received your money for these birds from Mr. Geers or Mr. Couch?

A. No, sir.

Q. Has Mr. Geers ever made the checks good, to your knowledge?

A. Not yet, no, sir.

The Court: I think you asked those questions this morning.

Mr. Maury: That will be all.

Mr. Nimocks: No questions.

The Court: You may step down.

(Witness excused.)

Mr. Maury: Counsel has stipulated this document may be received.

The Court: It maybe received as Plaintiff's Exhibit 22. [222]

The Clerk: Plaintiff's Exhibit 22 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 22.)

Mr. Maury: I will call Mr. Ohlson.

CARL W. OHLSON

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Carl W. Ohlson, O-h-l-s-o-n.

Direct Examination

Q. (By Mr. Maury): What is your occupation, Mr. Ohlson? A. Turkey grower.

Q. Are you the man we have been talking about here as having received some of these checks?

A. Yes, sir.

Q. Your ranch is where?

A. At the corner of Ramona Land and Nuevo Road.

Q. That is in Riverside County, California?

A. Yes, sir.

Q. Calling your attention to check which I have laid before you, defendants McKibben, Carter and Lewis Exhibit A, did you receive that check from Mr. Charles Geers? [223] A. Yes, sir.

Q. About when?

A. Well, on the date of the check.

(Testimony of Carl W. Ohlson.)

Q. The date of the check. It was not postdated?

A. No, sir. It was given to me at the scales at the time they weighed the turkeys out and got the weight.

Q. What did you do with the check?

A. I held it a couple of days and then gave it to Mr. Brooks to take in to Quaker Oats.

Q. That is your signature on the back of it?

A. Right.

Q. With respect to Plaintiff's Exhibit 1, is that made out to you? A. Yes, sir.

Q. Was that handed to you by Mr. Geers?

A. I don't remember whether it was handed to me by Mr. Geers or Mr. Couch. They were both there at the time.

Q. They were both there at the time?

A. That's right.

Q. And that was the 13th of August?

A. Yes, sir, I believe it was.

Q. Do you know how many birds they received from you at that time?

A. Well, Mr. Maury, I had a flock of 1500 birds to start with in that flock and I had lost something over 100 [224] birds mortality.

Mr. Nimock: I can't hear.

The Court: Will you keep your voice up?

The Witness: So I had approximately 1,375 to 1,400 birds. As far as I know, as far as I can remember now, I sold one small lot of about 75 or 80, and the balance of the birds were picked up by Mr. Couch and Mr. Geers.

(Testimony of Carl W. Ohlson.)

Q. (By Mr. Maury): Were they in one load?

A. No. I can't recall definitely whether they took the toms first or whether they took the hens first. There seems to be a haziness in my mind, but I have a recollection that they picked the toms up first, because they had an order for them.

Q. And that first purchase was evidenced by the \$2,611.75 check?

A. That's right. I believe that check was honored, was it not?

Q. Eventually, yes. The other two were given at the same time, that is, Plaintiff's Exhibit 1 and 2 were given for the second purchase?

A. That's right.

Q. That totals \$2,315.75? A. That's right.

Q. Was that the entire remaining flock that you had of birds? [225]

A. That was the balance of that particular flock. I had two other flocks that year.

Q. They were younger birds?

A. They were younger birds. These were the birds that I received as poults in February.

Q. Were they full grown by August?

A. Yes, they were well matured.

Q. Do you remember the poundage or weight that was taken off on each of these two occasions by any chance?

A. I think my hens average about 14 $\frac{1}{4}$ pounds. The toms I think run around 26 pounds average. Of course, that means that there were birds above and below that figure in the flock.

(Testimony of Carl W. Ohlson.)

Q. Surely. They don't run uniform in size.

A. They don't run absolutely even.

Q. With reference to Plaintiff's Exhibits 1 and 2, the \$600 check and the \$1,715 check, have you ever been paid that amount of money?

A. No, sir, I have not.

Q. Has it ever been credited to your account by Quaker?

A. In and out. It was credited when I turned the check over to them and debited back to my account when the checks returned to Quaker.

Mr. Maury: Cross examine.

The Court: May I ask this witness some questions? [226]

Mr. Maury: Surely.

The Court: How long have you been in the turkey business?

The Witness: About four years.

The Court: Have you always dealt with Quaker?

The Witness: I dealt with Quaker for the first two years and that was the second year of my dealings.

The Court: In 1952, that was your second year growing turkeys?

The Witness: Yes.

The Court: In 1951 had you grown turkeys?

The Witness: Yes.

The Court: Did you deal with Quaker?

The Witness: Yes, I did. I started with Quaker.

The Court: You said you had two other flocks?

The Witness: That's right.

The Court: Did you have those with Quaker, too?

(Testimony of Carl W. Ohlson.)

The Witness: Yes. The whole year's operation was with Quaker Oats Company.

The Court: In 1951, how many flocks did you have?

The Witness: Two.

The Court: Who sold the flocks?

The Witness: I sold the birds.

The Court: Did you have any written authorization from Quaker that you could sell them? [227]

The Witness: I was in contact with their field man right along and their field man, who was Mr. Canan at that time, recommended Mr. Muzak, and I sold my birds to him and I had no trouble.

The Court: They didn't give you any written memorandum?

The Witness: No, they didn't give me any written memorandum.

The Court: In 1952, did you sell any birds in 1952 before you sold the birds in litigation here?

The Witness: I sold approximately 75 or 80 birds to a small operator.

The Court: Did you have written consent from Quaker to sell those birds?

The Witness: No, I didn't.

The Court: Did you just sell them yourself and then you sent the money to Quaker?

The Witness: I sold them myself, and the check was made out to both of us, and I sent it to them.

The Court: Did you talk to the field representative before you sold those birds?

The Witness: Yes, I did.

(Testimony of Carl W. Ohlson.)

The Court: You didn't talk to the field representative before you sold the birds to Mr. Couch, did you?

The Witness: Not the first load of birds, because they came in and wanted the birds between the visits Mr. Brooks [228] made every week.

The Court: After you sold the first batch, you had a talk with him?

The Witness: I talked to Mr. Brooks about it and he said as far as he knew that Mr. Couch and Mr. Geers were operating legitimately, that there had been some trouble in a prior year with Mr. Couch, but he thought that had all been straightened out, but he suggested I get my checks in promptly.

The Court: He didn't tell you you couldn't sell to Couch?

The Witness: No, he did not.

The Court: He didn't tell you you had to have written authorization to sell?

The Witness: No. He said Quaker Oats were preparing a list of approved buyers, but I never did receive that list of approved buyers. That was after I had already sold the birds. I waited for it. He said that wasn't on that list I should call the office and make sure the operator was trustworthy.

The Court: You didn't have any experience in raising turkeys except these two years, is that right?

The Witness: That's right.

The Court: I have no other questions.

Mr. Nimocks: I have a few, your Honor. [229]

(Testimony of Carl W. Ohlson.)

Cross Examination

Q. (By Mr. Nimocks): Mr. Ohlson, I think you testified your recollection was that they picked up the toms first, is that correct?

A. I believe, I can't definitely say it is, but it is my recollection they picked up the toms first because they had an order for them.

Q. Do you recall what price per pound you were paid for those toms?

A. Well, as far as I can remember, it was right around 29 or 30. Prices were pretty punk that year.

Q. What price were you paid for the hens, do you recall?

A. I think it was 31 or 31½. I wouldn't make that as a definite statement. It could be checked with the weight slips.

Q. You don't have the weight slips with you?

A. No. Those were turned in to Mr. McCall of the State Department of Markets, and the Assistant District Attorney in Riverside. As far as I know, they have never been returned. They either have them or have turned them over to Quaker Oats, I don't know which.

Q. Do you know the general practice in the trade with regard to slaughtering these birds once they are sold?

A. Only what I have heard. I don't know directly. [230]

Q. Have you ever sold any birds directly to a processor?

A. Yes, I have sold birds to the Universal Mar-

(Testimony of Carl W. Ohlson.)

keting Company in Riverside, went in with the truck and weighed them out and saw them unloaded in a pen at the processor's plant.

Q. Do you know whether there is any shrinkage in these birds?

A. Between leaving my place?

Q. Yes.

A. Yes, certainly there is.

Mr. Nimocks: No more questions.

Mr. Geers: May I ask a question?

The Court: Yes.

Cross Examination

Q. (By Mr. Geers): Mr. Ohlson, did Quaker Oats explain to you fully the contract you were signing when you first started growing for them?

A. I wouldn't say there was a detailed explanation of the contract, no. That isn't usual in any business.

Q. How did they go about signing up a grower?

A. They ask you a number of questions in regard to your experience, your financial liability, your assets, and such pertinent data as they need to complete their records.

Q. Do you ask them any questions, then, as to what you [231] are supposed to do to fulfill your end of it?

A. I asked them whatever information I could think of at that time that I think will be helpful to me. What that was at that time, I can't recall.

(Testimony of Carl W. Ohlson.)

Q. Did they give you specific instructions on how to go about marketing and who to sell to?

A. No, I don't recall that I was given specific instructions.

Q. If you hadn't thought it was okay with Quaker Oats in following along the same method you had used the previous year, in 1951, in selling your birds, would you have sold those birds to us?

A. I wouldn't have sold them to anyone If I had known it was not the right thing to do, sir.

Mr. Geers: Thank you.

Redirect Examination

Q. (By Mr. Maury): Would you have sold them at all if you thought the checks were going to come back? A. Certainly not.

Q. You did not have any agreement with Mr. Geers whereby you would accept those checks as payment unless they cleared?

A. It was the assumption that those were good checks. I am holding the bag, Mr. Maury. I am out that money. [232]

Mr. Maury: That's all.

The Court: You may step down.

(Witness excused.) [233]

The Court: Call your next witness.

Mr. Maury: At this time, your Honor, I would like to call for the deposition of John Couch.

The Court: You want to read it into the record?

Mr. Maury: Yes, your Honor.

The Court: I suggest one of you ask the ques-

tions and the other will read the answers in the copy. Have you a copy?

Mr. Nimocks: I have a copy, but I shall object to its introduction as hearsay evidence, on behalf of the Defendants McKibben, Carter and Lewis. We never had any notice of the taking of the deposition.

Mr. Maury: That is true.

The Court: Mr. Couch is not here. He is deceased. This is the only testimony we have. I will overrule the objection.

Mr. Maury: Not only that, but I would also like to state in connection with the objection that Mr. Couch died about the 3rd of December, 1953 and that his deposition was taken January 21, 1953, and on October 12, almost sixty days before Mr. Couch departed this life, I personally handed a copy of this deposition to counsel while Mr. Couch was still alive and within the jurisdiction.

Mr. Nimocks: I had no opportunity to cross examine at that time.

Mr. Maury. You had an opportunity to take his [234] deposition, if you wanted it.

The Court: I will overrule the objection and allow you to read it.

Mr. Maury: This is the deposition of John Couch, a defendant herein, produced as a witness on behalf of the plaintiff, pursuant to the Federal Rules of Civil Procedure, and taken on Wednesday, January 21, 1953, at the hour of 11:00 o'clock a.m., at Suite 435—215 West Seventh Street, Los Angeles, California, before Clifford A. Hennen, a

Notary Public in and for the County of Los Angeles, pursuant to Order.

JOHN COUCH

a defendant herein, produced as a witness on behalf of the plaintiff, pursuant to the Federal Rules of Civil Procedure, being first duly sworn by the Notary Public, testified as follows:

The Notary: Will you state your name for the record, please?

The Witness: John Couch.

Direct Examination

Q. (By Mr. Maury): Will you state your name, please? A. John Couch.

Q. You are one of the defendants in this action?

A. That is right.

Q. Quaker Oats versus Couch and others.

How long have you known Charley Geers?

A. Two years.

Q. When did you first meet him?

A. A couple of years ago. I cannot say the exact date or anything.

Q. Where?

A. Working for Don Gilmore.

Q. Where did you meet him?

A. Riverside.

Q. Now, you have a place of business in Riverside, haven't you? A. That is right.

Q. Where is it?

A. 4398 Park Avenue.

Q. Is that at 14th and Park Avenue?

(Deposition of John Couch.)

A. That is right.

Q. What is the name of the concern?

A. Park Avenue Poultry.

Q. Park Avenue Poultry Company. Who owns it?

A. I do.

Q. How long have you owned it?

A. Ten months.

Q. Where did it have its bank account during August [236] of 1952?

A. Security-First National in Downey.

Q. Did it have any bank account at the Norwalk branch of the Bank of America?

A. Not as far as the poultry.

Q. Did you have a bank account there?

A. Yes, I did.

Q. And who else was on the signature card there?

A. Charley Geers.

Q. You were registered there as partners, were you not?

A. No.

Q. What did the signature card show?

A. Just a personal account, either one could sign.

Q. Was it a joint bank account belonging to both of you?

A. That is right.

Q. And the funds therein belonged to both of you?

A. That is right.

Mr. Maury: Let the record show that your counsel has handed me a copy of certificate of individuals doing business under the fictitious firm name which apparently shows that you published such a certificate in the Riverside Daily Press on

(Deposition of John Couch.)

April 11, 1952, and May 2nd of 1952, showing you to be the sole owner of the business entitled "Park Avenue Poultry Company," which is at 4398 Park Avenue, Riverside. [237]

Q. This document was published by you in the Riverside Press? A. That is right.

Q. And filed by you in the office of the County Clerk in Riverside? A. That is right.

Q. Now, during the month of August, 1952, where did Charley Geers do business?

A. You mean as far as buying poultry?

Q. Where was his headquarters for doing business?

A. Well, he worked out of the store. The calls came into my store.

Q. Now, I have here some photostatic copies of some checks. There is one check made out to C. W. Ohlson for \$600.00.

I want you to tell me if you are familiar with the handwriting on that check.

A. That is Charley's signature all right.

Q. Whose handwriting is the rest of the check in, do you know?

A. I do not think it is mine, but it could be.

Q. It could be yours. Are you acquainted with C. W. Ohlson?

A. Just from—not personally, no.

Q. Do you know him at all, personally or otherwise? [238]

A. Just from picking up the turkeys when we were out there once, is all.

(Deposition of John Couch.)

Q. You were out there once?

A. That is right.

Q. That was on the 13th of August, wasn't it?

A. I could not say what day.

Q. Well, was it at the time this check was given?

A. Possibly was.

Mr. Maury: I will ask the reporter to mark this check for identification.

(Thereupon, the document referred to was marked Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Maury): Calling your attention to other check dated August 13, 1952, made out to C. W. Ohlson and Quaker Oats Company, I hand you this. Please let your counsel see it.

I ask you, is any part of that check made out in your handwriting?

A. I do not think that one is, no.

Q. Are you familiar with the telephone number that appears in the upper left-hand section of that check?

A. That is the phone number of the store.

Q. And were you present when that check was written?

A. I could not say for sure.

Q. You will not say you were? [239]

A. I won't say I was or was not. I am not sure.

Q. You do remember the incident, however, of going out and purchasing some poultry from C. W. Ohlson, do you not?

A. I did not purchase it.

Q. You were there when it was purchased, weren't you?

(Deposition of John Couch.)

A. I was there when some of it was picked up. The deal was made over the phone, I think.

Q. And who made it?

A. Through Mr. Brooks and Charley Geers and Ohlson, if I am not mistaken.

Q. Charley Geers made the deal?

A. That is right.

Q. Then you went out with him, is that right?

A. Afterwards, yes.

Q. And picked up the turkeys, is that true?

A. Some of them, not all of them.

Q. How many did you pick up?

A. Oh, my truck—I only hauled one load, actually.

Q. And where did you take those?

A. Thrifty Poultry.

Q. How many were there?

A. A little over four thousand pounds. I do not remember exactly how much.

Q. And you delivered them to Thrifty Poultry?

A. That is right. [240]

Q. Who did you see there that you delivered them to? A. Orville Lewis, I think.

Q. And how much money did you get?

A. That I do not remember. It was turned over to Charley and he put it in the bank.

Q. You turned it all over to Charley Geers?

A. He put it in the bank.

Q. What bank? A. Norwalk.

Q. That is the bank account on which these checks were drawn? A. That is right.

(Deposition of John Couch.)

Q. When did you put it in there?

A. The same day.

Q. The same day that you delivered the checks?

A. That is right.

Q. And you delivered the checks to Ohlson, did you?

A. No, I did not deliver the checks to Ohlson.

Q. Who did?

A. Evidently when the turkeys were picked up at the scale that is when he got his check.

Q. That is when Ohlson got these two checks?

A. It would almost have had to have been, wouldn't it?

Q. I do not know. When you picked up those turkeys did you deliver the checks to Ohlson? [241]

A. Possibly could have because both trucks were going that day and they were filled out at the scale.

Q. By "both trucks" what do you mean?

A. My truck and his truck, too.

Q. Who is his truck?

A. Well, he had his own truck.

Q. Geers had his own truck?

A. That is right.

Q. And he put the money into the joint bank account of you and him?

A. That is right.

Q. Did you deliver those checks to Ohlson or did Geers?

A. Well, one or the other of us did or someone else that was working for us.

Q. You were both working on the same deal?

(Deposition of John Couch.)

A. No, I wasn't allowed to buy anything off of Quaker Oats. The deal was all his.

Q. How much money did you get out of the deal?

A. So far I haven't got anything.

Q. How much are you entitled to out of the deal?

A. I would like to have the \$1,400.00 it cost me.

Q. How much are you entitled to out of the whole deal?

A. There wasn't anything there to be entitled to. I was entitled to my truck, I mean, what I would have made on it.

Q. How much was that? [242]

A. I cannot very well say how much it is if you did not make anything.

Q. How much was it supposed to be?

A. It should have been a cent a pound for hauling.

Q. That is what Geers agreed to give you, a cent a pound?

A. On the whole thing, that is right.

Q. For hauling? A. Yes.

Q. How much are you supposed to share in the profits of the deal?

A. Well, on anything I haul I am supposed to get reimbursed, I mean, so much for hauling it.

Mr. St. Clair: That isn't the question. He is asking you, were you to get any profits out of the sale. Yes or no or what it was, in any period.

The Witness: Well, the agreement we made was

(Deposition of John Couch.)

anything I hauled for him would have been split, or if he had hauled anything for me it would have been split.

Q. (By Mr. Maury): I see. You would have split the profits, is that it? A. Yes.

Mr. Maury: All right.

Will you mark this second check, Mr. Reporter?

(Thereupon, the document above referred to was marked Plaintiff's Exhibit 2 for identification.)

The Witness: I was told by Mr. Geers that some of the checks cleared.

Q. (By Mr. Maury): For your information, there is not one of them that has cleared.

A. That doesn't quite total \$10,000.00.

Mr. St. Clair: Just a minute. You wait and answer his questions.

Q. (By Mr. Maury): Calling your attention, now, to this next check which is dated August 8th, which I hand you and which your counsel has seen, are you familiar with the handwriting on that check?

A. It looks like Charley's, but I could not be sure.

Q. Is it his signature? A. Yes.

Mr. St. Clair: Speak up so the reporter can hear what you say.

The Witness: It appears to be.

Q. (By Mr. Maury): It was drawn on his account where you and he had the joint account, is that right? A. That is right.

(Deposition of John Couch.)

Q. Do you know who wrote the words in the upper left-hand [244] corner that says "Park Avenue Poultry"?

A. It looks like the same writing.

Q. And that is the telephone number of the Park Avenue Poultry? A. That is right.

Q. That is Riverside Phone 12257, is that it?

A. That is right.

Q. Are you acquainted with Mr. McVickers?

A. Just to—met him once, is all.

Q. When was that?

A. When I picked that one load of turkeys and delivered them to Thrifty from him.

Q. When was that?

A. Around the 10th of August.

Q. About the 10th of August?

A. I am not sure what the date was.

Q. And was it on the same kind of a deal that you had with Charley Geers and with Ohlson?

A. That is right.

Mr. Maury: May this be marked, Mr. Reporter, as exhibit next in order?

(Thereupon, the document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Maury): Calling your attention, now, to this next check which is dated August 12, 1952, are you familiar with the [245] handwriting on that check?

A. Looks like the same as the other ones to me.

Q. And do you know what that was given for?

(Deposition of John Couch.)

A. It would have had to be for turkeys.

Q. Were you present when that check was given to McVickers?

A. I do not know for sure. I do not think so.

Q. You do not think so, but you may have been?

A. May have been.

Q. I see. If McVickers' testimony is that you were there he would probably be right, is that right?

A. By looking up my books I could probably tell whether I was in that day.

Q. You do keep a set of books which tell you where you were on such and such a day?

A. If I happen to issue a check or something on that date, it would have been there.

Q. Did you issue that check? A. No.

Q. It was issued on this bank account that you had a joint signature on?

A. That is right.

Q. I will call your attention to the next check which is dated August 13, 1952. Are you acquainted with the handwriting on that check? [246]

A. This is the one I picked up.

Mr. Maury: Will you mark the check dated August 12th, please.

(Thereupon, the document was marked Plaintiff's Exhibit No. 4 for identification.)

The Witness: This is the one I picked up that went to Thrifty Poultry.

Q. (By Mr. Maury): What do you mean?

(Deposition of John Couch.)

A. I remember the amount 1365, about 4,200 pounds.

Q. And you gave that check at the time the poultry was picked up?

A. That would have been the one I took out with me, yes.

Q. I see. You took the load of poultry out, then, on the 13th of August?

A. That is right.

Q. And did you give that check or did Geers give it at that time?

A. Well, I did not pick up the poultry, myself. I sent the truck out with the boy to pick it up.

Q. I see. It was your truck?

A. That is right.

Q. And you were to share in the profits of the poultry deal just as before? [247]

A. On this particular load I sold for him, Thrifty Poultry.

Q. What was the weight of that, do you know?

A. That I could not say for sure.

Q. The records of Thrifty would show you, however, would they?

A. Well, no. We had some stuff we took out of the store and added onto it.

Q. Then this check for \$1,365.90 is a check that was given——

A. That load went to Thrifty Poultry.

Q. Then you know that this check was given in exchange for poultry to McVickers?

A. That is right.

(Deposition of John Couch.)

Q. And this check is in the handwriting of Charley Geers, or is any of it in your handwriting?

A. I think the fellow that took the truck out filled it out.

Q. And it was sent out with your authority?

A. That is right. I sent the reports.

Mr. Maury: Will you mark this?

(Thereupon, the document referred to was marked Plaintiff's Exhibit 5 for identification.)

Mr. St. Clair: May we clear that, whether the authority is for the check or the truck, Mr. Maury?

Mr. Maury: All right. You clear it up.

Mr. St. Clair: Was that check sent out with your authority or was the truck sent out with your authority, or were both sent out with your authority?

The Witness: No, the truck was sent out with my authority to pick them up. Charley pays for them. I sold them.

Mr. St. Clair: Did you send the check out with the authority to give it to McVickers or not?

The Witness: No. Charley had to pay for them. I could not pay for them.

Q. (By Mr. Maury): Did you send the check with the driver of the truck?

A. No, Charley sent the check.

Q. Was he there when the truck started out?

A. Yes.

Q. And he gave the driver the check?

A. That is right.

Q. Were you there at the time?

(Deposition of John Couch.)

A. That is right.

Q. You saw the driver start off and saw Charley give him the check? A. Yes.

Q. Now, did you ever have any conversations with Mr. Ohlson about this deal? [249]

A. No, I did not.

Q. You never did? You are sure about it?

A. That was entirely up to Charley, the price he paid and the agreement they had.

Q. You are sure that you never talked to Mr. Ohlson, is that right, about this deal before it was made? A. No, I did not.

Q. You are sure of that? A. I am sure.

Q. How about McVickers? Did you go out to McVickers and talk to him before this deal was made? A. No, I did not.

Q. Now, how many pounds of turkeys did you deliver to the Downey Poultry and Rabbit Supply Company?

A. They would have the weight slips on that.

Q. But you did deliver some?

A. I helped them take them in, yes.

Q. That was turkeys that were received from the McVickers or the Ohlson ranches?

A. Yes.

Mr. St. Clair: May I clarify that? Was that McVickers, only, that you got turkeys from and delivered or was it Ohlson and McVickers?

The Witness: McVickers is the one I used my truck on to pick up the load that I delivered. [250]

(Deposition of John Couch.)

Q. (By Mr. Maury): Which did you deliver to Downey? A. That I do not know.

Q. But you did deliver some to each?

A. Yes. I mean, we had other stuff we put on the truck, too, stuff that I had.

Q. You did deliver some, then, to Downey Poultry? A. That is right.

Q. You delivered some to Thrifty?

A. That is right.

Q. And your truck picked up some from McVickers and some from Ohlson?

A. No, my truck did not pick up any from Ohlson.

Q. Were you to share in the profits of the turkeys that were received from Ohlson?

A. Well, if I had hauled any of them on my truck I would have been, but otherwise I did not.

Q. And yet you allowed the joint funds of yourself and Geers to be drawn on for the purchase of turkeys from Ohlson, is that correct?

A. We were going to enter into a partnership, which we never did.

Q. When were you going to enter into a partnership?

A. As soon as he got his license and everything all cleared up. [251]

Q. And when did you have an agreement to enter into a partnership?

A. We talked about. I do not know the exact date.

(Deposition of John Couch.)

Q. Was it about the time you opened this bank account in Norwalk?

A. Some time along about that time.

Q. When was that opened?

A. I could not say offhand.

Q. How many other bank accounts have you and Geers opened? A. None.

Q. None at all? A. No.

Q. That is the only one?

A. That is right.

Mr. Maury: I think that is about all, counsel.

Do you wish to ask any questions?

Mr. St. Clair: No, not this time.

Mr. Maury: The record may show that I hand the exhibits to the reporter for custody purposes only. The original photostats will be attached to the original deposition.

Mr. St. Clair: It is stipulated that this may be read and signed before any Notary Public?

Mr. Maury: Yes, either in this county or Riverside. [252]

Mr. Nimocks: For the purpose of the record, your Honor, I would like to make a motion to strike on the basis, interposing an objection, that the matter is still hearsay as far as McKibben, Carter and Lewis.

The Court: Overruled.

Mr. Maury: Counsel has stipulated this is his signature, your Honor, and I offer it.

The Court: It may be received as Plaintiff's Exhibit 23.

Mr. Maury: It shows the receipt of the deposition.

The Clerk: Exhibit 23.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 23.)

Mr. Maury: The plaintiff rests, your Honor.

Mr. Nimocks: Now, at this time on behalf of the Defendants McKibben, Lewis and Carter, I would like to make a motion for nonsuit. My motion is based on the following facts.

The Court: You just make the motion and I will do the ruling and then we will proceed on with the case. You just make the motion.

Mr. Nimocks: I do make it on the basis of the fact that he has failed to trace his turkeys.

The Court: Denied. You may proceed. [253]

SAMUEL GEORGE MORNING

called as a witness by and on behalf of the Defendants McKibben, Carter and Lewis, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Samuel George Morning.

Direct Examination

Q. (By Mr. Nimocks): Where do you live?

A. Fontana.

Q. What is your trade or occupation?

A. Poultry buyer.

Q. How long have you been so engaged?

(Testimony of Samuel George Morning.)

A. Six years.

Q. Six years, you say? A. Yes, sir.

Q. During that time have you purchased turkeys from growers who had chattel mortgages with Quaker Oats? A. Yes, sir.

Q. What was the general practice in the trade, if you know, as to procedure in handling these turkeys?

A. Well, we buy them from the farmer, direct from the farmer.

Q. How do you make out your check in payment? [254]

A. To the farmer and the feed company.

Q. Have you had any written notice from Quaker Oats in those instances as to how you should proceed? A. No, sir.

Q. Do you deal with Quaker Oats representatives? A. I never have, sir.

Q. How do you ascertain whether these birds are mortgaged or not?

A. We ask the farmer, and if he says they are mortgaged, we ask him who by, and we make out the check to him. If he says they are not mortgaged, they are his, and his flock is too big, we don't buy them or we check into it.

Q. Has that been the general practice during your six years?

A. That has been my practice, yes, sir.

Mr. Nimocks: I believe that's all, your Honor.

(Testimony of Samuel George Morning.)

Cross Examination

Q. (By Mr. Maury): Mr. Morning, you said if the flock is too big, you check into it?

A. Say a person has anywheres over one hundred, say one hundred birds, we know a man can't have that much money, nobody has got that much money to handle them personally.

Q. What kind of check do you make if the man has that many? [255]

A. We make out the check to the feed company and the farmer.

Q. What do you mean by check into it?

A. If he says they are his birds, I try to find out where he buys his feed, and I go to the feed company, and if I find out he pays cash for the feed, then I go back and buy them.

Q. Do you always ask these questions about a flock larger than a hundred?

A. You bet your life.

Q. How many dollars would that be?

A. One hundred tom turkeys run right around eight or nine hundred dollars.

Q. And one thousand would be eight or nine thousand? A. You ain't just kiddin'.

Q. So you exercise what you call care in looking into the question of whether or not there is a mortgage on the flock?

A. That is to protect myself.

Mr. Maury: I think that's all.

The Court: May I ask a question?

You have bought turkeys from farmers who have

(Testimony of Samuel George Morning.)
had their turkeys mortgaged to feed companies?

The Witness: Yes, sir.

The Court: Have you ever seen a written authorization for [256] the farmer to sell the birds?

A. I never have, sir.

The Court: You have always dealt with the farmer direct?

The Witness: Yes, sir.

The Court: Never dealt with the one who owns the mortgage or holds the mortgage?

The Witness: No, sir, I have not.

The Court: I have no other questions.

Q. (By Mr. Maury): Have you ever dealt, sir, with any truckers who just brought birds to your place? A. No. I am a buyer.

Q. For whom? A. For myself.

Q. Are you a processor?

A. No, sir, I am just a hauler.

Q. Just as Mr. Geers and John Couch were?

A. Well, maybe not quite that way, but I am a hauler.

The Court: You have a different technique.

Q. (By Mr. Maury): I take it your credit is good? A. I think so.

Q. Have you ever had any checks bounce for birds you bought?

A. If I have, I have never got them back.

Q. When you buy birds and take them to a processor, if the birds are larger than say one hundred birds, what, if any [257] custom is there with

(Testimony of Samuel George Morning.)

respect to the processors asking you about mortgages?

A. Well, they have, and I tell them I make the checks out to the farmer and I got a receipt showing the farmer signed the slip. If they want to see it, I show them that I bought and paid for the birds.

Mr. Maury: That's all.

Redirect Examination

Q. (By Mr. Nimocks): You buy these birds yourself? A. That's right.

Q. You sell them to the processor at a profit, is that correct? A. Yes.

Q. You inform the processor where you got the birds?

A. No. That is my business. If they have their own trucks, they might go out and try to buy them from under me.

Q. In other words. you pay for the birds and you resell them?

A. I pay for the birds at the scale and I take them into town and get my check there.

Mr. Nimocks: No further questions. [258]

Recross Examination

Q. (By Mr. Maury): If the processor asks you where you got the birds you have for sale, you tell them, is that right?

A. After I have bought the birds, yes, not before.

Q. You go to a farmer, you buy the birds, and you take them to the processor?

(Testimony of Samuel George Morning.)

A. If there are some more birds on the farm, I don't tell them until I get them off. You know, they are kind of chiselers, too. They will go out and buy under you.

Mr. Maury: Thank you, sir.

Redirect Examination

Q. (By Mr. Nimocks): Is it customary for these processors to ask you where the birds came from?

A. No, they don't. I have been hauling quite a few years, and occasionally they ask me, and I tell them, if they want to know about my business, they will have to advertise like I do.

Mr. Geers: They might ask the locality, but not the grower.

The Witness: Oh, they might ask and I would tell them Perris, Riverside, or wherever it might be, but I don't tell them the exact address. [259]

Mr. Geers: That is all.

The Court: You may step down.

(Witness excused.)

Mr. Nimocks: I represented to the Court I would put on both defendants, but in talking it over I have decided not to call them. I have another witness, but he will testify to just about the same thing Mr. Howard Fritz.

Mr. Maury: If it is corroborative, I will stipulate it will be the same.

Mr. Nimocks: I will accept the stipulation and the defendants will rest.

The Court: We have got another defendant here. Mr. Geers?

Mr. Geers: Well, your Honor, I think my part of the case is pretty well covered in the banking technique.

The Court: You have no other testimony?

Mr. Geers: None, except the fact that we did have the money in the bank.

The Court: That is argument. You rely on the testimony already presented in this case?

Mr. Geers: I don't know of anything we could say further.

The Court: All right. Let the record show you rest.

Mr. Geers: And the exhibits you have.

The Court: I don't want you to say later you were cut off from presenting any evidence you have. If you have any [260] additional evidence, I would want it now.

Mr. Geers: None other than the exhibits.

The Court: All right.

Mr. Maury: Suppose we have a recess and we will decide whether we have any rebuttal during the recess.

The Court: We will now recess until twenty minutes to 3:00.

(Recess.)

Mr. Maury: I should like to recall Mr. Geers for a few questions, your Honor.

The Court: All right.

CHARLEY GEERS

called as a witness in rebuttal on behalf on the Plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Maury): Mr. Geers, I believe you testified yesterday prior to purchase of these turkeys in each instance you had an arrangement with an L. A. market, is that right? A. Yes.

Q. For the sale of them?

A. Yes. I said with the exception of possibly some [261] that might have gone to the beach.

Q. What L.A. market was this you had an arrangement with to sell the turkeys before you bought them?

A. Mr. Couch handled most of the phone calls and what not, because he had the connections to sell. He knew all the people, the processors in the L.A. trade area through the past experience he had with them.

Q. But as to these particular sales at the L.A. market, what market was it you had the arrangement with?

A. I couldn't answer that question.

Q. But you know you did have an arrangement?

A. I know on part of them, yes.

Q. During the recess you examined those documents that are in evidence and you mentioned to me the sum of \$3,000 that you did not find as having been deposited in the bank account. Will you tell the Court about that?

(Testimony of Charley Geers.)

A. Well, at one time we sold some turkeys, some breeder turkeys, a long time before this period we have been discussing here in court. They came from, I believe the Smith Ranch near Perris, and they sold those turkeys, we sold them to Simmons Processing Plant and the check was somewhere in the neighborhood of \$3,000, something like that, and I know that Mr. Couch took the check down to Simmons' bank right there, I think in Monrovia or somewhere in that area, wherever the man did his banking business, he took the check down and [262] cashed it and gave instructions to the truck driver, I happened to have my car there at the time, or his, I have forgotten which one, but it doesn't make any difference, and we went on home, back to Riverside.

Q. Who is "we"?

A. John Couch and myself. He gave the money to this truck driver and told him to take it down and deposit it.

Q. Did the deposit show up in the bank account at all? A. No, sir, it did not.

Q. You have looked the bank account over to find if it was there? A. I did.

Mr. Maury: I think that's all.

The Court: Any other questions?

Mr. Nimocks: Yes, your Honor.

Cross Examination

Q. (By Mr. Nimocks): Do you recall, Mr. Geers, whether any of the particular deliveries in question

(Testimony of Charley Geers.)

were held over by you and Mr. Couch for any period of time before delivery to the processor?

A. I will say this. Never in all the time I worked with Johnny did we ever hold over an entire load to my [263] knowledge. Portions of a load, yes.

Q. Did you ever split loads? A. Yes.

Q. You were selling to other processors during this period?

A. Yes, I believe we were. Actually, I went to market only, about, I would say two or three times during this period of time. During I will say a month's period I went maybe six times. Our two trucks were pretty busy most of the time.

Q. Do you recall any telephone conversation you had with Mr. Brooks with regard to purchase of the Ohlson turkeys?

A. Yes, I believe I had a telephone conversation with him.

Q. When did that take place with relation to this first purchase? A. I don't know.

Q. Was it before or afterwards?

A. Mr. Brooks testified the other day, if I remember correctly, yesterday, that when he and I had a conversation at the scales the turkeys didn't enter into it, but I beg to differ with him.

Q. What about these telephone conversations, were they before or after the first purchase from Ohlson? A. I don't remember.

Q. Do you recall the substance of the conversations? [264] A. No, I can't.

Mr. Nimocks: I have no further questions.

(Testimony of Charley Geers.)

Redirect Examination

Q. (By Mr. Maury): You have closed out the bank account, have you not?

A. I think it died a natural death. At the time, just about that time I found out what was going on and I cut loose from Mr. Couch when I found that one check there.

Mr. Maury: That's all.

The Court: You may step down.

(Witness excused.)

The Court: Any other testimony?

Mr. Maury: We have no other testimony. I would like to have some time to brief this case.

The Court: I will be glad to give you time to brief the case, but I would like to discuss the case with you a little bit.

(Discussion between Court and counsel.)

The Court: I will take the matter under submission. I will give both parties until March 25 to file their opening brief. I want simultaneous briefs. I find I have better results by getting simultaneous briefs. Otherwise, one party waits for the first brief and tries to answer that without giving me his authorities. Then I will allow each party [265] until the first day of April to file a reply, if they want to, and then the matter will stand submitted as of April 1st.

Mr. Nimocks: The first brief March 25?

The Court: Yes, and April 1st to reply. That gives you thirty days.

Mr. Maury: Thank you, sir.

The Court: Court will stand at recess until 10:00 o'clock tomorrow morning. [266]

[Endorsed]: Filed August 3, 1954.

[Endorsed]: No. 14471. United States Court of Appeals for the Ninth Circuit. The Quaker Oats Company, a corporation, Appellant, vs. W. E. McKibben, A. B. Carter, O. R. Lewis and Charley Geers, Appellees. The Quaker Oats Company, a corporation, Appellant, vs. Charley Geers, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: August 5, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14471

THE QUAKER OATS COMPANY, etc.,
Appellant,

vs.

JOHN J. COUCH, CHARLEY GEERS, O. R.
LEWIS, et al., Respondents.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD (On Both Appeals)

Appellant's Statement of Points

1. The Trial Court erred in making and entering two separate (and inconsistent) sets of Findings of Fact, and Conclusions of Law.
2. The Trial Court erred in making and entering two separate (and inconsistent) judgments.
3. The Trial Court erred in holding that sales of turkeys had been made and were complete prior to the honoring of the checks given for payment by the bank upon which drawn.
4. The Trial Court erred in holding that the purchasers of the turkeys were not charged with constructive notice of the entire contents of the recorded chattel mortgages.
5. The Trial Court erred in holding that usage and custom prevailed over written, recorded documents.
6. The Trial Court erred, in the "McKibben-Carter-Lewis Findings," (hereinafter called the

MCL Findings) in failing to note, consider, and give weight to the fact, in the MCL finding numbered 1, that the recorded Chattel Mortgages themselves contained clauses notifying the world that no sales by growers would be valid without Appellant's written consent.

7. The Trial Court erred, in MCL finding numbered 3, in finding, contrary to the evidence, that Couch (now deceased) personally made all the purchases of turkeys from the growers.

8. The Trial Court erred in entering MCL finding numbered 3 in that it is contrary to the evidence and confuses money in bank with uncollected deposits.

9. The Trial Court erred in finding that defendant Charley Geers had no notice of the terms of the Chattel Mortgages.

10. The Trial Court erred in entering Finding numbered 7 of the Findings of Fact and Conclusions of Law, hereinafter called the "Geers Findings," as the same is unsupported by the evidence and confuses money in the bank with uncollected deposits.

11. The Trial Court erred in making and entering the Conclusions of Law proposed by defendant Geers.

12. The Trial Court erred in making Finding numbered 11 of the Geers Findings, as same is unsupported by and is contrary to the evidence.

13. The Trial Court erred in making Finding numbered 12 of the Geers Findings, as the same is contrary to the evidence.

14. The Trial Court erred in making MCL Finding numbered 5, as it is contrary to the evidence, and unsupported thereby.

15. The Trial Court erred in entering MCL Finding numbered 8, as it is contrary to and unsupported by the evidence.

16. The Trial Court erred in entering MCL Finding numbered 9, as it is a blanket finding and is unsupported by and is contrary to the evidence.

17. The Trial Court erred in holding that the lien of the Chattel Mortgage was not valid against the defendants McKibben, Carter, and Lewis.

18. The Trial Court erred in holding that the lien of the Chattel Mortgage was not valid against the defendant Charley Geers.

19. The Trial Court erred in deciding the case in favor of the defendants, each respectively, and against the plaintiff.

Designation of Record

1. The Complaint;
2. The Answers of each and all of the defendants;
3. Any and all other pleadings as such are defined by the Federal Rules of Civil Procedure;
4. Any and all documentary evidence, including all exhibits in evidence;
5. Any and all exhibits in evidence and/or identified and marked for identification during the course of the trial, as adduced by any party;
6. The Memorandum of Opinion of the District Judge;

7. The Findings of Fact and Conclusions of Law as proposed by Frank C. Nimocks, attorney for defendants McKibben, Carter, and Lewis, and signed by the Judge, and entered;

8. The Findings of Fact and Conclusions of Law as proposed by defendant Charley Geers, and signed by the Judge, and entered;

9. The Judgment as proposed by Frank C. Nimocks, attorney for defendants McKibben, Carter and Lewis, and signed by the Judge, and entered;

10. The Judgment as proposed by defendant Charley Geers in propria persona, and signed by the Judge, and entered;

11. The Notices of Appeal on file herein (2);

12. The transcript which was stenographically reported in accordance with Rule 75 (b), and appellant hereby designates the entire reporter's transcript.

13. This Statement of Points and Designation of Record.

Dated: September 23, 1954.

MAURY, LARSEN & HUNT,
/s/ By GEORGE R. MAURY,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 24, 1954. Paul P. O'Brien, Clerk.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and CHARLEY
GEERS,

Appellees.

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

CHARLEY GEERS,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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FILED

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PAUL F. O'BRIEN,
CLERK



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No. 14471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and CHARLEY
GEERS,

Appellees.

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

CHARLEY GEERS,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

[Rule 18(2)(b).]

Jurisdiction is based on diversity of citizenship. The plaintiff is a New Jersey corporation [Complaint, Par. 1, R. 3]; the defendants are citizens of California. [Answers, R. 12, 18; Findings, R. 34, Par. 5; R. 38, Pars. 1, 2, 8; Pre-trial Stipulation, R. 20.] Property valued at \$9,000.00 plus, or bad checks totaling \$6,600.00 plus is involved.

The statutory provisions which sustain jurisdiction are 18 U. S. C. 1332. (Diversity of citizenship and amount involved.)

Abstract of Case.

The Quaker Oats Co., plaintiff and appellant, in August, 1952, held two recorded chattel mortgages to secure feed bill upon flocks of turkeys being grown by Ohlson and wife, and by McVickers and wife, respectively, in Riverside County, Southern District of California, Central Division.

Defendants Geers and Couch (Couch died prior to trial) were "hucksters" who engaged to purchase certain turkeys from Ohlson and McVickers, giving checks therefor at the scales and taking the turkeys away. Said checks were, all but one, made out jointly to the grower and to The Quaker Oats Co. The hucksters thereupon transported the turkeys to Los Angeles, outside of Riverside County, California, within a period of less than thirty days, and sold said turkeys to the defendants McKibben, Carter, and Lewis. McKibben and Carter were partners in the turkey processing business; Lewis operated another processing business, separate from McKibben and Carter.

The checks given by Geers and Couch were dishonored by the bank upon which drawn and have never been made good. The total dishonored checks amount to \$6,604.45. [Exs. 1, 2, 3, 4, and 5 in Evid.]

The questions involved are:

(1) Whether plaintiff's chattel mortgages gave constructive notice to the hucksters and processors of plaintiff's right to possession.

(2) Whether the passing of bad checks by the hucksters to the growers passed title to the turkeys from the growers to the hucksters, *i.e.*, whether the bad checks,

never honored, *per se* constituted *payment* of the purchase price.

(3) Whether usage and custom is sufficient, when it was not relied upon by the processor defendants, to vary the terms of recorded chattel mortgages by parol evidence of such usage between grower, mortgagee, and huckster only.

(4) *Caveat emptor* should apply to the processors.

Specifications of Error.

1. The Trial Court erred in making and entering two separate (and inconsistent) sets of Findings of Fact and Conclusions of Law. [R. 31-35, incl.; 37-42, incl.]

2. The Trial Court erred in making and entering two separate (and inconsistent) judgments. [R. 36-37, 42-43.]

3. The Trial Court erred in holding that sales of turkeys had been made and were complete prior to the honoring of the checks given for payment by the bank upon which drawn. [R. 33, wherein the Findings state: "All checks given by Couch and/or Geers *in payment* for turkeys involved herein; R. 34, Finding No. 5; R. 34-35, Conclusion No. 2; R. 35, Conclusion No. 4; R. 40, Finding No. 7; R. 40, Finding No. 8; R. 41, Finding No. 9; R. 41, Finding No. 10.]

4. The Trial Court erred in holding that the purchasers of the turkeys were not charged with constructive notice of the entire contents of the recorded chattel mortgages. [R. 22, Memorandum of Opinion of the Trial Judge states as follows: "A chattel mortgage was obtained from each of the turkey growers which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mort-

gage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded." The chattel mortgages involved, *i.e.*, Exs. 14 and 15, duly recorded, each provide that mortgagee shall have immediate right of possession ". . . or if grower shall sell or assign or attempt to sell or assign any part of the mortgaged property without the prior written consent of the mortgagee" R. 39, Finding No. 4; R. 32, Finding No. 1; R. 39-40, Finding No. 5; R. 40, Finding No. 6.]

5. The Trial Court erred in holding that usage and custom not relied upon by the processors, prevailed over written, recorded chattel mortgages. [R. 33, Finding No. 4; R. 41, Finding No. 11.]

6. The Trial Court erred, in the "McKibben-Carter-Lewis Findings" (hereinafter called the MCL Findings), in failing to note, consider, and given weight to the fact, in the MCL finding numbered 1, that the recorded Chattel Mortgages themselves contained clauses notifying the world that no sales by growers would be valid without appellant's written consent. [R. 22, Memorandum of Opinion of the Trial Judge states as follows: "A chattel mortgage was obtained from each of the turkey growers which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mortgage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded." The chattel mortgages involved, *i.e.*, Exs. 14 and 15, duly recorded,

each provide that mortgagee shall have immediate right of possession “. . . if grower shall sell or assign or attempt to sell or assign any part of the mortgaged property without the prior written consent of the mortgagee . . .” R. 39, Finding No. 4; R. 32, Finding No. 1; R. 39-40, Finding No. 5; R. 40, Finding No. 6.]

7. The Trial Court erred in MCL Finding No. 3, in finding, contrary to the evidence, that Couch (now deceased) personally made all the purchases of turkeys from the growers. [R. 38, Finding No. 2; R. 32, Finding No. 3.]

8. The Trial Court erred in entering MCL Finding No. 3 in that it is contrary to the evidence and confuses money in bank with uncollected deposits. [R. 33, Finding No. 3.]

9. The Trial Court erred in finding that defendant Charley Geers had no notice of the terms of the Chattel Mortgages. [Exs. 14 and 15 in Evid.; R. 39, Finding No. 5: “Quaker Oats did not notify . . . Charley Geers that they did not have the right to sell turkeys without first obtaining plaintiff’s written consent; . . .” R. 40, Finding No. 6: “. . . and at no time notified . . . the defendant Charley Geers that they did not have the right to sell turkeys without first obtaining plaintiff’s written consent.”]

10. The Trial Court erred in entering Finding No. 7 of the Findings of Fact and Conclusions of Law, hereinafter called the “Geers Findings,” as the same is unsupported by the evidence and confuses money in the bank with uncollected deposits. [R. 40, Finding No. 7; Exs. 7 and 9; Ex. A of Deft. Geers.]

11. The Trial Court erred in making and entering the Conclusions of Law proposed by defendant Geers. [The evidence conclusively shows that Geers gave the bad checks; Geers signed them; Geers took some birds to market; Geers received the purchase price for the birds from the processors and put at least some of the money into the mutual bank account and has never made the checks good. R. 48-91, 270-273; Exs. 1, 2, 3, 4, 5, 6, 7; Geers Ex. A; Exs. 8, 9, 10-A, 10-B, 10-C, 10-D, 11, 14, 15, 16, 17, 18, 19, 21, 22; R. 67.]

12. The Trial Court erred in making Finding No. 11 of the Geers Findings, as same is unsupported by and is contrary to the evidence. [R. 65-66, 77-78, 154-155, 175; Testimony of Lewis, R. 209: "They wait until the check has cleared, I mean they don't take a check as currency anyhow, whether it is in the feed business or anywhere else. I mean the check has to be good. Q. The check is not considered payment unless it is good? A. Not in any line that I have ever seen." R. 222-223, 236-237, 241, 246, 266.]

13. The Trial Court erred in making Finding No. 12 of the Geers Findings, as the same is contrary to the evidence. [R. 41, Finding No. 12. (This is a blanket finding that each and all of the allegations numbered VI, VII, and VIII are untrue. These paragraphs are found at R. 5 and are properly numbered in Arabic 6, 7, and 8. The evidence is replete that the chattel mortgages were not discharged and were in full force and effect during August of 1952) and that, insofar as Geers is concerned, he certainly wrongfully removed from Riverside County 1500 live turkeys, *i.e.*, 30,000 pounds, the subject of said mortgage, from Riverside County to Los Angeles County, and converted them to his own use. The reasonable value

is shown by the purchase price on the various invoices from 30¢ to 32¢ a pound, or at least \$9,000.00.]

14. The Trial Court erred in making MCL Finding No. 5 [R. 34] as it is contrary to the evidence, and unsupported thereby. This is unsupported by the evidence because there was no written or other agreement whatsoever that the checks were to be treated as cash; on the contrary, all evidence is that the checks are “not considered payment unless they were good.” [R. 65-66, 77-78, 154-155, 175, 209, 222-223, 236-237, 241, 266.] Not one word of evidence in the entire Record will support this finding that “all parties treated the same as cash transactions.”

15. The Trial Court erred in entering MCL Finding No. 8, as it is contrary to and unsupported by the evidence. [This is a blanket finding that each and all of the allegations numbered VI, VII and VIII, are untrue. These paragraphs are found at R. 5 and are properly numbered in Arabic 6, 7, and 8. The evidence is replete that the chattel mortgages were not discharged and were in full force and effect during August of 1952.]

16. The Trial Court erred in entering MCL Finding No. 9, as it is a blanket finding and is unsupported by and is contrary to the evidence. [R. 13-14.]

17. The Trial Court erred in holding that the lien of the Chattel Mortgage was not valid against the defendants McKibben, Carter, and Lewis. [R. 35, Conclusion No. 3.]

18. The Trial Court erred in holding that the lien of the Chattel Mortgage was not valid against the defendant Charley Geers. [R. 42, Conclusion No. 1.]

19. The Trial Court erred in deciding the case in favor of the defendants, each respectively, and against the plaintiff.

CONCISE ARGUMENT OF THE CASE.

(1) Technical Points.

We do not consider technical points generally to be important. We prefer to have cases decided entirely upon the merits.

The Memorandum of Opinion is designated in the Record [R. 21-31, incl.] to illustrate, *inter alia*, that realistic orientation of the Lower Court to the actual position of the parties was lacking. In the first place [R. 23], the Lower Court, in the Memorandum of Opinion, stated quite clearly that "Prior to the commencement of this action *Geers* was killed in an automobile accident and in consequence was not named as a party defendant." This in spite of the fact that it was Couch who was killed, while Geers personally had appeared in court as a defendant, appearing *in propria persona* [R. 18-20, incl.]; and as a witness before the Court [R. 48-91, 270-273] he testified in the flesh. This conceivably could be overlooked as a mere inadvertence but for the fact that *in context* throughout the entire Memorandum of Opinion the Court mentions both John J. Couch and Charley Geers and distinguishes between them by saying [R. 23]: "Defendant Couch's main duty being to contact the farmers, buy the turkeys, and transport them to Los Angeles, where they were turned over to Geers for sale."

The memorandum is negated by the subsequent Findings, Conclusions, and Judgment which were interposed by the defendant Geers himself [R. 37-43] and signed by the judge without correcting or in any wise altering the Memorandum of Opinion.

In this same manner, two sets of Findings of Fact, two sets of Conclusions of Law, and two Judgments have been entered.

This produces inconsistency and confusion, and in the main, we submit the better practice would be to enter (in a case such as this) only one set of Findings and Conclusions, and only one judgment. Both judgments are, however, appealed from in their entirety. [R. 44, 45.]

(2) The Effect of the Recorded Chattel Mortgages.

The Trial Judge failed to recognize and give any effect to the clause in the chattel mortgages (both *duly recorded*) containing the plaintiff's right of possession if sold without plaintiff's written consent. At R. 22 the Court, in its Memorandum, states:

"A chattel mortgage was obtained from each of the turkey growers which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mortgage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded."

Throughout the entire Memorandum of Opinion, throughout both series of Findings of Fact, throughout both sets of Conclusions, and throughout both Judgments, it is apparent that the trial judge tacitly adverted from the fact that the chattel mortgages contained a proviso that,

". . . or if grower shall sell or assign any part of the mortgaged property without the prior written consent of the mortgagees, . . . mortgagees may take possession of the mortgaged property."

These recorded documents the Court leaps lightly over and brushes aside in both sets of Findings, as follows (1) [R. 32]:

“At the time of the execution of the chattel mortgage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained plaintiff’s written consent. *These contracts were never recorded,*”

and (2) [R. 33]:

“It is true that, notwithstanding the written *unrecorded* contracts between plaintiff and growers, it was the custom of plaintiff to allow its growers to sell their turkeys,”

and [R. 38-38]:

“That these mortgages were executed as security for poults and feed furnished by plaintiff to Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marion T. Ohlson.

“4. That at the time of the execution of the chattel mortgage an additional contract was entered into between Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marion T. Ohlson by which Harry T. McVickers and Ruth E. McVickers and Carl W. Ohlson and Marion T. Ohlson agreed not to sell any of the turkeys without written consent of plaintiff; that this written contract was not recorded.”

We urge the law to be that duly recorded chattel mortgages, in California, give constructive notice to the world of *all* of their contents.

Sections 2957 to 2978, California Civil Code, govern chattel mortgages.

This California law has been outlined and explained by Justice Lemmon in *England v. Moore Equipment Co.*, 8 Fed. Supp. 532 (aff'd 187 F. 2d 1019 by this Court), as follows:

“At common law delivery to and possession by the mortgagee of a mortgaged chattel was required. This has become changed by statute in California and recordation has been substituted for delivery and possession. *Ruggles v. Cannedy*, 127 Cal. 290, 297, 53 P. 911, 59 P. 827, 46 L. R. A. 371. The authority for the creation of a chattel mortgage in this state derives its source from the statutory enactments and all rights accruing by virtue of such mortgages can be protected and preserved only by fully meeting the requirements of the statute and strictly observing its provisions. *Hopper v. Keys*, 152 Cal. 488, 92 P. 1017.

“Section 3440 of the Civil Code of the State of California was designed to prevent secret liens upon and secret transfers of personal property and requires in order to effect a transfer of personal property that there be an immediate delivery and continued change in possession, without which the transfer is void as to creditors and as to purchasers and encumbrancers in good faith. Mortgages allowed by law are exempted therefrom. Mortgages not executed and recorded as provided by law are subject to the penalty provided under Section 3440. *Ruggles v. Cannedy*, *supra*.

“There is presented to the Court the question as to whether or not the mortgage, though valid in its inception, was no longer in existence at the time of the private sale above mentioned.

“The conditions which must be compelled with in the creation of a valid lien upon personal property

are found in Section 2957 of the Civil Code. Among other requirements enumerated therein are those for recording of mortgages of property, such as here involved, in the offices of the recorder of the county where the property is located, or the county where the mortgagor resides at the time the mortgage is executed and 'in the county to which such property is thereafter removed.'

"Section 2965 of the Civil Code provides that if mortgaged personal property, such as the property here under consideration, is removed from the county in which it is situated, the lien or mortgage shall not be effected by such removal for a period of 30 days after such removal, but that, after the expiration of the 30 days, the property is exempted from the operation of the mortgage, except as between the parties thereto, until either:

"1. The mortgagee causes the mortgage to be recorded in the county to which the property has been removed; or

"2. The mortgagee takes possession of the property as prescribed in the next section.

"The next section, Section 2966, provides: 'If the mortgagor voluntarily removes or permits the removal of the mortgaged property * * * from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.' "

See also:

Swift v. Higgins, 72 F. 2d 791.

The cases from the California courts hold in accord:

Bank of California v. McCoy, 23 Cal. App. 2d 192, 72 P. 2d 923.

In the case of *Elliott v. Hudson*, 18 Cal. App. 642 at 646, 142 Pac. 103, 108, we find the following:

“There seems to be no provision of the code expressly making the recordation of a chattel mortgage constructive notice of its contents. Constructive notice is that ‘which is imputed by law’ * * * and ‘Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiries he might have learned the fact.’ * * * Section 2963, Civil Code, *supra*, gives the recordation of a mortgage of personal property like effect with that of grants of real property, and without doubt persons about to purchase personal property which is the subject of a chattel mortgage would be charged with constructive notice of a recorded mortgage of such property if it were not at the time part of realty.”

Analogous in many respects to the case at bar is the case of *Hammels v. Sentous*, 151 Cal. 520, 91 Pac. 327. This was an action to recover damages for conversion of personal property—as is this present action. Plaintiff was the owner of a promissory note, *secured by a chattel mortgage* upon 41 heifers and 169 hogs in San Diego County. The mortgage was duly acknowledged and recorded. On January 4, 1905, without the knowledge or consent of the plaintiff Coe, the mortgagor removed 86 of the hogs to Los Angeles, and on the next day he sold and delivered the hogs to the defendants who, within ten days thereafter, slaughtered the hogs and sold and disposed of the meat. The defendants had no *actual* notice of plaintiff’s mortgage and bought the hogs in the belief that Coe was the owner as he represented himself to be. No question was raised as to the validity of the mortgage.

The Court held that the removal from San Diego to Los Angeles County did not invalidate the lien and that it lasted for a period of thirty days after the removal under the statute. The Court stated "for, if the mortgage was suspended by the removal and was not in force when the defendants purchased the hogs, a good title passed by such purchase and nothing was added to it by the fact that plaintiff did not subsequently record his mortgage in Los Angeles County. On the other hand, if the mortgage was a valid and subsisting lien for thirty days after removal, the defendants were guilty of conversion in appropriating the property and destroying it during such period (*Wilson v. Prouty*, 70 Cal. 196, 11 Pac. 608) The plaintiff had a complete cause of action when such conversion was committed and did not lose this cause of action by failing at a later date to comply with the useless form of recording a mortgage of property no longer in existence.

While in this case no question of re-recording arises, the case of *Hammels v. Sentous*, is cited as authority that conversion occurred by the defendants Geers' and Couch's taking the birds in exchange for bad checks and thereafter "reselling" to the defendants McKibben, Carter and Lewis. And that McKibben, Carter and Lewis each were guilty of additional conversion by appropriating the property and destroying it in Los Angeles when the checks given by Couch and Geers were valueless and dishonored.

A similar case with respect to a fruit crop tortiously removed is *Pacific Fruit Exchange v. F. C. Booth Co.*, 103 Cal. App. 54, 283 Pac. 944, which cites *Hammels v. Sentous*, and holds that "One who purchases such property within such period in the County to which it

has been removed is guilty of conversion in appropriating the same.”

The doctrine by comity extends to chattel mortgages executed in other States where the property is found in California. See *Motors Investment Co. v. Breslauer*, 64 Cal. App. 230, 221 Pac. 700, where it is stated:

“The principle underlying it may be analogized to that upon which the owner of property stolen from him, or taken or transported to another State, may follow the thief into the latter State and reclaim or take possession of the pilfered goods or chattel, wherever found. A State may, it is true, refuse to recognize the Rule of Comity in such cases but, should it do so, it would become a party to every such fraudulent transaction. It is not going too far to say, and to hold, that it is preferable and more desirable that an innocent purchaser, or encumbrancer, of personal property brought into a State under such circumstances as those characterizing the transaction with which we are here concerned should suffer loss, *which possibly his own improvidence or want of diligence has brought to him*, than that the state should assume and maintain an attitude towards such transaction which would necessarily stigmatize it as an accessory after the fact to the fraud inhering therein.” (Italics ours.)

We, therefore, respectfully here submit that until the moments of “sale” (so-called herein only for purposes of discussion) from grower to huckster, the chattel mortgages were valid, subsisting liens upon the birds. And that when “sold” for bad checks and transported to Los Angeles County, the plaintiff, both under the law and under the terms of the recorded chattel mortgages, was entitled to possession.

(3) Bad Checks Are Not Payment.

We believe we demonstrate herein the error of the lower Court in its Findings of Fact, Conclusions of Law, and Judgment where it held that bad checks are legal payment and that title passed by virtue of these "sales" from grower to huckster:

In the MCL Conclusions [R. 35] the Court concludes:

"Therefore the sales to defendants did not constitute a conversion of said birds, and *title to said birds passed* to defendants free and clear of any claims of plaintiff." (Italics ours.)

Likewise, in MCL Finding No. 5 [R. 35], the Court finds:

"It is true that, although the transaction involved herein were carried on by payment by check, all parties treated the same as cash transactions."

In the Geers Findings, the Court found [R. 41]:

"That the custom in the turkey industry in August of 1952 was to pay farmers by check payable to the farmers and to the feed company, and that the custom of the turkey business was that these checks would be accepted and were treated as cash."

We assert, we believe advisedly, that *there is not one word of testimony, not one bit of evidence, in the entire record* to sustain the Findings above quoted. We assert, too, that there is not one authority in all of the decided appellate cases, either Federal or State, so construing California law. The Conclusion of Law of the learned Trial Judge is, we submit, entirely erroneous. Title did NOT pass by virtue of the bad checks, and Couch and Geers never owned the birds.

A case very close factually to the case at bar is *Charles H. Clark v. Hamilton Diamond Company*, 209 Cal. 1, 284 Pac. 915. The subject was a diamond ring. The action was for possession. Plaintiff sold the ring to one Harry Justice who “fraudulently gave a worthless check in payment therefor.” Justice traded the ring to a Mr. Dye as a payment on a second-hand automobile. Dye deposited the ring for sale with one Allen, retail jeweler. Allen placed the ring in the possession of one Friedman, who went about from store to store buying and selling jewelry. Friedman *sold* the ring to the defendant, who purchased it *without knowledge* of the transaction between plaintiff and Harry Justice. Immediately upon receipt of the check from Justice, the plaintiff deposited it in due course of business for collection and it was returned marked “Not sufficient funds.” Immediately thereupon plaintiff brought the action and obtained possession. The findings indicate that sale of the ring to Justice was for cash. The plaintiff did not waive immediate cash payment and gave no *indicia* or muniment of title to anyone when the sale was made. In obtaining the ring, Cohen, the purchaser, did not rely upon any evidence of title in the grantor.

Cohen appealed contending that he was a bona fide purchaser of the ring without knowledge of the defect of title.

The Court stated as follows:

“That the sale of the ring by plaintiff to Justice was in effect a sale for cash as distinguished from a sale on credit, payment to be made, as is customary in similar transactions, by check. As it was not agreed that the check was to be received as absolute payment, the delivery of the ring to Justice was also

conditional and *the check being dishonored upon due presentation, title to the ring remained in plaintiff.*”

(*South San Francisco Packing and Provision Company v. Jacobsen*, 183 Cal. 131, 190 Pac. 628.) It seems to be very definitely settled by that case and the authorities there cited that as between the parties, upon the check being dishonored, the seller is clearly entitled to resume possession of the property. As between the original seller and third parties, the relation is to be determined by what the vendor has done or has not done. In this case the plaintiff gave to Justice, the original purchaser, no indicia of title other than the possession of the property. He followed the due course of business in attempting to secure payment of the check and took immediate steps to recover the ring upon learning that the check was worthless. Appellant has not made it appear in fact, nor does he claim he was injured by any delay on plaintiff's part. It is very clear from the findings that in this case the plaintiff did not transfer the possession of the ring to Justice with a power to dispose of it; therefore, Section 1442 of the Civil Code does not apply and any executed sale by Justice, or those purporting to claim under him, does not transfer plaintiff's title to them. (*Pacific Acceptance Corporation v. Bank of Italy*, 59 Cal. App. 76, 209 Pac. 1024.)

“There was no other indicia of ownership than mere possession. That was not enough. There must have been some act or conduct on the part of the real owner whereby the parties selling were clothed with apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the innocent third persons dealing on the faith of such appearances.”

With the difference, we submit, that here the chattel mortgagee, instead of the title holder, is prosecuting the rights under its lien, which the owner could just as readily prosecute (and of which the owners will receive the eventual benefit, if any) the two cases are virtually identical in chain of events.

Another case very similar in fact is found in *Mitchell v. Porter*, 123 Cal. App. 329, 11 P. 2d 58.

In that case the property was an automobile. Mitchell purchased it and received a certificate of registration. He became ill and went to Arizona for his health. On leaving he appointed his father his agent to sell the car. The father advertised the car and one C. E. Marks appeared and negotiated to purchase the car. Marks produced a check and tendered it in payment. The father stated that before he turned over the automobile or papers that he must be given time to ascertain if the check was good. Marks consented but asked permission to drive the automobile to the insurance office wherein he proposed to have new insurance issued in his own name and promised that he would return as soon as Mitchell obtained information about the check. To obtain insurance, Mark asked to have possession of the old policies and "the pink slip"; hence these papers were endorsed to him. The true owner, John F. Mitchell, had signed the pink slip on the last line on the face of it. When his father delivered the pink slip to Marks, the blanks on the reverse side for the signatures of registered and legal owners had not been filled. No writing appeared on those lines when the father delivered the pink slip to Marks. No bill of sale, or anything purporting to be so, was delivered to Marks by the father. Marks was never seen again by plaintiff or the father. Marks appeared at the place of

business of the defendant Porter in Salinas and sold the car to Porter, signing "John Mitchell" three times on the "pink slip." He also signed a bill of sale. The check was dishonored; in fact, the maker had no account at the bank. Porter then sought to register the transfer of the automobile. A demand for possession was made by plaintiff. Litigation followed. The automobile was awarded to plaintiff, the true owner.

We have cited the foregoing as factual illustrations of analogous cases and their disposition in the courts. The lower court here has considered and based its decision upon such consideration, that the transactions between the growers and the hucksters in each instance constituted a valid sale. Therein lies, we believe, the basic error. A sale in law envisions the payment of a purchase price. We believe this is axiomatic.

But here no purchase price was paid.

The evidence is incontrovertible that the checks [Exs. 1, 2, 3 and 5] totaling \$6,604.45, all were dishonored and have never been made good. [Exs. 1, 2, 3, 4 and 5 in evidence; R. 40, Testimony of Geers, Finding No. 7; R. 33, M. C. L., Finding No. 3.]

The rule of law in this respect is stated generally in 70 Corpus Juris Secundum, page 233, as follows:

- "§24—Checks. a. In general
b. Agreement or consent of creditor
c. Negotiation or deposit
d. Diligence and laches

"a. *In General*

"The delivery to, or acceptance by, the creditor of the debtor's check, as distinguished from the actual

payment of the check, is not absolute payment of the obligation for which the check is given in the absence of any agreement or consent to receive it as payment, or any laches or lack of diligence on the part of the creditor, or negotiation by the check by him.

“The delivery to, or acceptance by, the creditor of his debtor’s check, although for convenience often treated as the passage of money, is not payment, even though the check is certified before delivery, in the absence of any agreement or consent to receive it as payment, or any laches or want of diligence on the part of the creditor, or the negotiation of the check by him, as discussed *infra* subdivisions b—d of this section. In such case, the original debt is not paid or discharged unless, and until, the check itself is actually paid on due presentment, or, it is sometimes stated, until it is honored or accepted by the drawee; and, where the check is not paid on presentment, the creditor may treat it as a nullity, return it, and recover on the original debt, or, at his option, sue on the check.

“On the other hand, where a check delivered to a creditor, although without any agreement or consent on his part to receive it as absolute payment, is in fact paid in due course, the debt is discharged *pro tanto*, as of the time at which the check was received; but a payment other than in due course does not extinguish the debt. A check is accordingly often referred to as conditional payment, the condition being its collectibility from the bank on which it is drawn. On fulfillment of the condition by payment of the check on presentation, the payment, which was previously conditional, becomes absolute.

“While it has been said that, in order for a check to have the effect of payment, the drawer must have sufficient funds in the bank to pay the check or it must appear that the check would be paid on presentment in the usual course of business, it has been held that a check which is not paid or converted into cash or its equivalent is not payment of the obligation for which it is given, notwithstanding the drawer has sufficient funds on deposit with the bank to meet the check and the bank is solvent, and that, if the check is paid, it is immaterial that the bank is insolvent.”

The rule in California is the same.

In *DeBerry v. Cavalier*, 113 Cal. App. 30, 35, it is stated as follows:

“. . . In 21 Ruling Case Law 37, section 34, it is said: ‘In the absence of any agreement to the contrary money is the sole medium of payment.’ At page 60, section 59, of the last-cited authority, it is further said: ‘With the exception of a few jurisdictions the authorities are unanimous in supporting the rule that the giving of a bank check by a debtor for the amount of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt.’”

In *Swan v. Smith*, 102 Cal. App. 541, 543, the rule is stated to this effect:

“‘The giving of a note or check of a debtor or a third party for the amount of a debt does not constitute payment unless there is an agreement between the parties that it shall be so accepted. . . . The general rule above stated does not require that in order to constitute the giving of a note or check a

payment there shall be express words or writing agreeing that the instrument shall be absolute payment. The circumstances and the conduct of the parties taken together may show an understanding that the paper is taken in satisfaction of the debt.' ”

In the case of *Westberg v. Whittiken*, 101 Cal. App. 204, 281 Pac. 509, the subject is discussed:

“The next contention of the appellants is to the effect that the taking of the trade acceptances issued by the DeLuxe Building Company, constituted a payment. All there is in the record upon which this argument can be based is the simple indorsement of the word ‘paid’ appearing upon the account rendered for the materials furnished and labor performed. There does not appear to have been any agreement or understanding that the trade acceptances in and of themselves should constitute payment. Under such circumstances the general rule relating to payments as set forth in 48 C. J., page 610, prevails. The rule is there stated as follows: ‘The rule obtaining in most jurisdictions is that, in the absence of agreement or consent to receive it, as such, a draft or bill of exchange, although accepted by the drawee, or a promissory note of the debtor, or his acceptance of a draft or bill of exchange drawn upon him does not, in itself, constitute payment or amount to a discharge of the debt, although it may postpone the right of action thereon until the maturity of the paper, but if such paper, delivered to a creditor, is thereafter honored or paid, the debt is discharged *pro tanto* as of the date of such collection or payment, and accordingly a bill or note is often designated *prima facie* or conditional payment.’ The authorities supporting this statement of the law cited in *Corpus Juris*, *supra*, are simply legion. The rule is stated

in different language, but to the same effect, in 20 California Jurisprudence, page 920: 'The giving of a note or check of a debtor or a third party for the amount of a debt does not constitute payment unless there is an agreement between the parties that it shall be so accepted. The rule is based upon the obvious ground that nothing is to be considered as payment in fact but that which is in truth such unless something else is expressly agreed to be received in its place.' It is further there stated that if the note or check is not paid, action may be had upon the original debt. And as further stated in the same volume, pages 925 and 926, the marking of the account as paid does not prevent the court inquiring into and ascertaining the true facts, and if the checks or notes or bills of exchange are dishonored, the indorsement of the word 'paid' on the original statement of account is immaterial. The following cases show that the rule announced in Corpus Juris and California Jurisprudence is followed in the State of California: *Ellison v. Henion*, 183 Cal. 171 [11 A. L. R. 444, 190 Pac. 793]; *South S. F. Packing etc. Co. v. Jacobsen*, 183 Cal. 131 [190 Pac. 628]."

Now here, the defendant processors have [perhaps] pleaded in their answers that there was a special agreement for the acceptance of the check by the growers and the mortgagee in payment [R. 13-14; 19-20]. The Court made no findings that there was such a specific agreement but

"all parties treated the same as cash transactions." [R. 34] and

"All checks given by Couch and/or Geers in payment for turkeys . . ." [R. 33, 41] and,

"That the custom in the turkey business was that the checks would be accepted and be treated as cash."

However, the lower Court *nowhere* found that there was any *agreement* either between grower or huckster, or between huckster and mortgagee, that these unpaid dishonored checks were to be accepted as payment. It could hardly do this because on the contrary, we find the record replete with evidence that there never was any such agreement in respect thereto, we submit the following excerpts:

(1) [R. 65-66]: Testimony of Geers:

“Q. (By Mr. Maury): Did he ever tell you Ohlson or McVickers or the Quaker Oats Company would accept bad checks in payment? A. I don’t believe we went into that.

Q. Didn’t discuss that? A. No.

Q. Didn’t discuss payment at all, did you? A. I don’t remember exactly whether we did or not, sir, I think basically you have to deal with the farmer, anyway.

Q. Tell us what you remember of what happened. A. When?

Q. As well as you can remember. Was anything said by you or Brooks respecting payment?

Q. You think he mentioned that they were paid by check? A. I think he mentioned that they were paid by check? Okay, I am assuming. I am thinking to the best of my knowledge. You said, ‘the best you can remember.’

Q. I want the best you can remember. A. I can say I don’t remember then. [R. 23.]

Q. You don’t remember? A. No.

Q. You don’t remember anything Mr. Brooks said about payment, is that right? A. I don’t remember.

Q. You don't remember? A. That's right.

Q. I am going to ask you, was anything said about payment that you remember? A. I don't recall of even discussing payment with him."

(2) [R. 67] Testimony of Geers:

"Q. (By Mr. Maury): Have you ever made any of these checks which you signed good? A. I think you have one that was cleared.

Q. I am talking about ones that are in evidence before you. A. No, sir.

Q. Exhibits 1, 2, 3, and 5. A. No, sir.

Q. You knew they were all dishonored at the bank, did [25] you not? A. I did not know it until after I had quit Couch.

Q. You haven't paid anything on account, have you? A. No sir."

(3) [R. 77-78] Testimony of Geers:

"The Witness: There is one instance when I didn't deposit a check. The check was in the amount of \$400. I believe it was from Mr. McKibben. The reason for that was I have a friend in the Citizens Bank at Riverside, and John wrote me a check for \$400.00. I took the check in, and even though I didn't have an account there, this fellow is assistant cashier in the bank, so he put an O. K. on it, and I went over to the teller and he O.K.'d and he gave me the cash, and some time later he called me up, and it bounced high as a kite, and I had to scrape up \$400 to make it good. I think Mack owed us some money, and I came down and his girl wrote a check for \$400, and I think you will find that during the period there."

(4) [R. 175] Testimony of McKibben:

“Q. In fact, you didn’t discuss any lien on the birds at [149] all, did you? A. No sir.

Q. Or any mode of payment by Mr. Couch or Geers for their receipt of the birds? A. No, I don’t believe we discussed it.”

(5) [R. 209] Testimony of Lewis:

“Q. Do you know of any custom or usage in the trade, the turkey industry, that checks are accepted as payment whether or not they are good checks? A. Well, it is customary when I give the farmers a check payable to the feed company and the farmer for him to in turn turn that over to the feed company as a payment on his bill, which naturally he is given the same form of credit on it as in a bank deposit. They wait until the check has cleared, I mean they don’t take a check as currency anyhow whether it is in the feed business or anywhere else. *I mean the check has to be good.* (Italics ours.)

Q. The check is not considered payment unless it is good? A. Not in any line I have ever seen [188].”

From the foregoing we urge that very clearly there is no custom or usage to the effect that bad checks are accepted in payment.

The growers did not know of such a custom or usage either [see R. 222-223] Testimony of McVickers:

“Q. You are acquainted with Mr. Brooks? A. Yes.

Q. At about this time did you have any conversations with him? A. No, I didn’t.

Q. Didn’t he call over and get one of the checks? A. Yes, that’s right.

Q. What did he say that time?

The Court: Just a minute. Prior to the sale to Geers, you had no conversation with Mr. Brooks?

The Witness: No, I didn't.

The Court: But after the sale, you did?

The Witness: Right after.

The Court: All right.

Q. (By Mr. Maury): What was said at that time by him and by you? A. Well, I received the checks back that there wasn't [204] sufficient funds there in the bank, so Brooks picked them up, and that was it.

Q. What do you mean by 'that was it'? He just took them along with him? A. That's right.

Q. What did he say he was going to do with them? A. Turn them in to Quaker Oats.

Q. How do you know there was insufficient funds in the bank at that time? A. He had picked the two checks up that I had previously sold and took them in.

Q. That was the first two checks had been sent in by you to Quaker? A. That's right.

Q. And the third one, he came out and picked it up, is that it? A. I think he did.

Q. At that time did he tell you that the first two were refused by the bank? A. That's right.

Q. What else was said, if anything? A. I just don't remember what was said then. That was the finish of the turkeys. That was the last check.

Q. Have you ever received payment for those checks? A. No, I haven't [205].

Q. Have you ever received any credit on the books of Quaker for those checks? A. Not that I know of.

Q. Has Quaker ever given you any statement showing those checks have been paid? A. No.”

See also [R. 236] Testimony of McVickers:

“A. As far as that is concerned, I wouldn’t say yes or no.

The Court: He can’t testify to that.

The Witness: What have I got to do with this? What difference does it make whether I say this is this or this is that? Does that prove anything to me? *I haven’t got the money, so why should I answer a question like that?* [220].” (Emphasis ours.)

And [R. 237] Testimony of McVickers:

“Q. (By Mr. Maury): You didn’t expect to sell turkeys for bad checks, though, did you? A. No, I did not. In a way, maybe the man is innocent, I don’t know, but as a general rule we try to do legitimate business. That is where your written contract comes in which has been talked about which isn’t enforced to a certain extent. It is more taking it for granted that a man is good.

Q. Have you ever received your money for these birds from Mr. Geers or Mr. Couch? A. No, sir.

Q. Has Mr. Geers ever made the checks good, to your knowledge? A. Not yet, no sir.”

To the same effect is the showing from the other grower [R. 241] Testimony of Ohlson:

“Q. With reference to plaintiff’s Exhibits 1 and 2, the \$600 check and the \$1,715 check, have you ever been paid that amount of money? A. No, sir, I have not.

Q. Has it ever been credited to your account by Quaker? A. In and out. It was credited when

I turned the check over to them and debited back to my account when the checks returned to Quaker.”

We do not wish to belabor the Court unduly with an evidential analysis but we believe that the foregoing constitutes all of the evidence of the record which even remotely bears upon the proposition that there was a distinct agreement that these checks should be accepted as payment whether they turned out good or bad.

Similar situations have arisen before. In the case of *So. San Francisco Packing, etc. v. Jacobsen*, 183 Cal. 131, 19 Pac. 628, it appears that Taylor & Rosecrans in Idaho were partners engaged in the livestock business, as was Jacobsen. Jacobsen purchased three carloads of hogs from Taylor & Rosecrans to be delivered in Idaho where Jacobsen, or his agent, was to receive them and make payment *by check*. The hogs were delivered; a check for \$3,490.98 was given in payment to Jacobsen’s agent. Before noon of the following day it was deposited for collection with the firm’s bank at Burley, Idaho. When it reached the bank on which it was drawn (in Idaho Falls) three days later, payment was refused for lack of funds. Jacobsen had no arrangement with the bank for credit or overdraft. Jacobsen disappeared. In the meantime he had shipped the hogs to the plaintiff, which in turn disposed of them in San Francisco for a price. Taylor & Rosecrans demanded the price fund from the plaintiff under a claim of ownership. About that time Western Meat Company, a creditor of Jacobsen, levied an attachment on this price fund. Judgment went for the Western Meat Company against Taylor & Rosecrans who appealed. the Court held:

“Whether or not title to personal property passes through a sale thereof at the time of its delivery depends upon the intention of the parties as shown by all the facts and circumstances of the case, so that the question is ordinarily one of fact for the jury, or for the court when sitting without a jury. Where, however, the facts bearing upon the question of intent are undisputed only a question of law is presented. Here the evidence shows without conflict that Jacobsen was to pay for the hogs upon delivery by check; and it is argued by the respondent that accordingly, a check having been given and received in payment for the hogs, title to the animals passed to the buyer notwithstanding that upon due presentation the check was dishonored. This argument is supported by reference to cases holding that parties may agree to accept a check or bill or note as absolute payment for goods sold in which case title to the goods will pass upon such acceptance irrespective of whether the paper is honored upon due presentation or not. We think, however, that the facts of this case do not bring it within the principle referred to, for it is quite apparent that the requirement of the vendor that a check should be given by the buyer upon the delivery of the hogs was intended as the equivalent of an insistence upon payment on delivery; in other words, that it was not a sale on credit, nor for the check as such, but that delivery of the animals and payment for them, though such payment might be made by check, were to be simultaneous, and the transaction was understood by the vendee in this sense. The legal situation thus arising can logically be no different from one where the terms of the sale are cash on delivery and a check is accepted by the vendor. In such case it is held that the acceptance of the check is no waiver of immediate payment, and although delivery is made of the

goods upon receipt of the check, title thereto does not pass as between the parties unless, upon due presentation the check is paid.

“ ‘A check is accepted as a particular form of cash payment, and if dishonored the vendor may resort to his original claim on the ground that there has been a defeasance of the condition on which it was taken.’ (Benjamin on Sales, 7th ed., pp. 755-772.)

“ ‘If the sale is for cash, and the check of the buyer is taken, this will operate as no more than a conditional payment as well as a conditional delivery; and if upon due presentation of the check it is dishonored the vendor may retake possession of the goods.’ [23 RCL, p. 1448.]

“ ‘While a delivery is perhaps the most significant fact as indicating an intention to transfer the title it is not conclusive, and notwithstanding there has been a delivery the property will not pass if it appears that such was the intention of the parties, as when payment is made a condition precedent to the passing of the property.’ (35 Cyc. 308.)

“ ‘The title will not pass until payment if by the terms of the contract such payment is a condition precedent, or if it otherwise appears that such was the intention of the parties, unless the condition as to payment is waived.’ (35 Cyc. 322.)

“ ‘The condition as to payment or security is one which may be waived by the seller, in which case title to the goods sold will vest in the buyer although the condition has not been performed. . . . Whether the delivery is conditional or unconditional depends primarily upon the intention of the parties as shown by all the facts and circumstances of the case, and so it is ordinarily a question of fact for the jury. If the sale is for cash the mere acceptance

of a check does not constitute absolute payment or waiver of the condition as to payment. Where the seller delivers the goods conditionally and without any intention of waiving payment or security the property does not pass; and in order to render the delivery conditional within the application of this rule it is not necessary that there should be any express declaration to that effect, but it is sufficient if it appears that such was the understanding of the parties, or that the delivery was made in the expectation of immediate payment, the question being primarily one of intention as shown by all the facts and circumstances of the case. . . . So if the seller delivers on an understanding, express or implied, that he is to receive immediate payment or security he may reclaim the goods, or if he delivers on payment by check instead of cash, and the check is dishonored, he may reclaim the property.' (35 Cyc., pp. 327-328.)

“‘In effect, this sale was for cash as distinguished from a sale on credit, payment to be made, as is customary in similar commercial transactions, by check, and as it was not agreed that the check was to be received as absolute payment, and the delivery of the goods also was conditional, and the check, upon due presentation, was dishonored, title to the hogs remained in the seller. In *Johnson etc. Co. v. Central Bank*, 116 Mo. 558 [38 Am. St. Rep. 615, 22 S. W. 813], it is held that a check given for the purchase price does not constitute payment until the money is actually received by the vendor unless it is otherwise expressly agreed. In *National Bank v. Chicago, etc. Ry.*, 44 Minn. 224, [20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560], it is held that where goods are sold for cash on delivery, and payment is made by check, such check is, in fact,

payment only when the cash is received on it, and that there is no presumption that a creditor takes a check in payment from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Such payment is only conditional or a means of obtaining the money. So, in *Hodgson v. Barrett*, 33 Ohio St. 63, [31 Am. Rep. 527], it is held that payment by check is a mere mode of making a cash payment; that it is conditional only, and if the check, upon due presentation, is dishonored the vendor may retake the goods from the purchaser.

“There is nothing in this record indicating that the original sellers intend to accept Jacobsen’s check as absolute payment. True, they were to accept a check in payment for the hogs, but this is the usual method in cash transactions of any magnitude, and it is employed as a matter of convenience and to obviate the necessity of handling and transporting large sums of money with its attendant risks. In the case of *Comptoir d’Escompte v. Bresbach*, 78 Cal. 15 [20 Pac. 28], it is said that the language of the manager of the plaintiff bank in stating that a check which was subsequently dishonored, was accepted in payment of the debt sued upon should not be construed as signifying anything more the [than] provisional or conditional payment presumed by law, and is no evidence of absolute payment.

“The title to the hogs, therefore, as between the parties to the sale having remained in the original sellers, it follows, we have no doubt, that the fund in the hands of the plaintiff, the purchase from Jacobsen, constituting part of the purchase price, belongs to the original sellers, Taylor & Rosecrans; and we also entertain no doubt that so far as the

attaching creditor is concerned it has no better right to the fund than Jacobsen himself. (*Ward v. Waterman*, 85 Cal. 491, 508 [24 Pac. 930].)”

A case even more closely in point is the case of *Towey v. Esser*, 133 Cal. App. 669, 24 P. 2d 835.

In that case, in reversing, the upper court made a finding from undisputed evidence which contradicted and was contrary to the findings of the Trial Court, and found that the title to the cattle at all times had remained in the seller, appellants. The upper court, based upon such modified findings, thereupon ordered the Trial Court to enter judgment in favor of the successful appellant. This action was approved by the Supreme Court of California by refusal to hear the cause. The case is additional authority for the legal proposition that

“where personal property is sold to be paid for upon delivery by check the sale is to be treated as one for cash and, if the check is dishonored, the title to the property, as between the parties to the sale, remains in the seller who may retake the property, or if the property has been resold, claim the proceeds in the hands of the second purchaser as against an attaching creditor of the original buyer.”

To the same effect is the case of *Utah Construction Co. v. Western Pacific Ry.*, 174 Cal. 156, 166, as follows:

“The plaintiff insists that ‘the giving of a check upon an insolvent bank is not a payment of the debt for which it is taken.’ This may be admitted. A check is never a payment of the debt for which it is given until the check itself is paid or otherwise discharged, unless expressly agreed to be taken in payment. (More on Banks and Banking, secs. 543, 544.)”

Likewise, *Williams v. Braun*, 14 Cal. App. 396, 398, sets up the reason for the rule as follows:

“ . . . The person who is indebted to another and gives a check to his creditor does not by the mere giving of the check pay the indebtedness. A check is only a request to another to pay to the payee thereof the sum named therein out of the funds supposed to be deposited to meet such check. If the drawee does not comply with the request the fund is still there and the debtor still owes the money.”

One of the latest cases along these lines in California is the case of *Mendiondo v. Greitman*, 93 Cal. App. 2d 765, 767, 209 P. 2d 817, where the Court says:

“ . . . The mere giving of a check does not constitute payment (*Weger v. Rochas*, 138 Cal. App. 109 [32 P. 2d 417]; *Drukker v. Howe & Hawn Investment Co.*, 136 Cal. App. 437 [29 P. 2d 289]) nor does the mere acceptance thereof raise a presumption that such acceptance constitutes payment. . . . And since a check of itself is not payment until cashed the party attempting to prove payment by mere delivery or acceptance must go further and in addition prove that such delivery and acceptance was in accordance with an agreement that it was to be accepted as payment.”

In all, the checks were dishonored by the bank; they have never been made good; the processors both agree that checks have to be good. Title does not pass unless the checks are good. We believe the learned trial judge was clearly in error when he in effect decided the case as though the checks had been honored.

(4) Caveat Emptor Applies.

The Court has dwelt much in its Memorandum Opinion, in its Findings and its Conclusions upon the failure of the plaintiff to insist upon a strict performance of the terms of an unrecorded contract requiring written permission for the growers to sell chattel mortgaged property. It has, largely upon its own volition, and upon the basis of a "usage and custom" by the Court found to exist in the turkey industry, permitted parol evidence to violate and vary the terms of written contracts for the benefit of third persons not parties to those contracts. There were several steps in each transaction. The plaintiff, lienor, did not know the turkeys were being "sold" or that they were "sold" until after it all happened. Geers and Couch gave the bad checks. We submit, no title passed to Geers and Couch. ("Bad checks are not payment," *supra*.) Thus title remained in the growers, and the lien was good between the growers and the plaintiff. Thereupon, when the hucksters resold the turkeys to the processors, they were still subject to the lien.

By the terms of the *recorded mortgages*, upon such "attempted sale," plaintiff became entitled to possession. The usage and custom set up by the Finding to pay farmers by check payable to the farmers *and* the feed company may perhaps find support in the evidence. But the additional custom which has been grafted into the Findings *i. e.*, "that the custom in the turkey business was that these checks would be accepted and were treated as cash" finds no support in the evidence whatsoever.

The processors each testified that they were not concerned as to where the title lay. At R. 171, testimony of McKibben, we find:

“Q. (By Mr. Maury): Do you have any personal recollection of these transactions [145] or any of them? A. Only that these turkeys were offered to us by John Couch.

Q. And you bought them? A. We bought them.

Q. Do you know where Mr. Couch resided at that time? A. In Riverside.

Q. Did you check any records in Riverside to determine whether there were any mortgages on these birds? A. No, I didn't, sir. It is not customary.

Q. Did you ask Mr. Couch whether the title was clear and unencumbered? A. No, I didn't.

The Court: May I ask this witness a question?

Mr. Maury: Certainly, your Honor.

The Court: Do you keep any record as to where these turkeys originate from?

The Witness: Where they originate from?

The Court: Yes. Couch came down with a bunch of turkeys and he offered them to you for sale.

The Witness: Yes, sir.

The Court: Do you know where they came from? San Diego County, Riverside County, San Bernardino County, Ventura County?

The Witness: We don't signify an individual purchase [146] as to what county it might come out of.

The Court: Have you any record to show where these turkeys came from?

The Witness: None other than our purchase record and our knowledge of the transaction.

The Court: Your Exhibit 19 says 310 young tom turkeys.

The Witness: Yes, sir.

The Court: So do you know where those turkeys came from?

The Witness: From John Couch.

The Court: Do you know where he got them?

The Witness: No, sir.

The Court: Is that true in all your invoices?

The Witness: That is true of all of them, yes.

The Court: You never asked John Couch where the turkeys came from?

The Witness: The only conversation I had with John Couch was at the particular time I bought some deliveries, he had birds that were supposed to be near the weights we needed for our requirements, and from a faint recollection they were supposed to be some toms out of Lancaster area. Other than that, there was no discussion of what town they were coming from, what grower, what milling company they were coming from."

And at R. 206-207, testimony of Lewis, we find:

"The Court: The truckers, what do you do about the truckers?

The Witness: We buy the stuff without question.

The Court: Without any inquiry at all?

The Witness: That is the general procedure, unless we are suspicious of the man.

The Court: Are you familiar with the custom in Southern California relating to the sale of poult and sale of feed to the farmers?

The Witness: Right.

The Court: What is that custom? [185]

The Witness: I would say 90 per cent of the large flocks are owned by feed companies.

The Court: Are owned by the feed companies?

The Witness: I mean through the mortgage.

The Court: You mean through the mortgaging to the feed company? They are mortgaged to the feed company?

The Witness: Right."

Thus we find that the defendant processors exercised no care whatever in the purchase of the turkeys, did nothing to ascertain whether or not the hucksters had a right to sell them, and relied upon no indicia whatsoever of ownership other than the mere possession of the hucksters, and were fully advised that "90 per cent of the flocks are owned by feed companies through the mortgage."

As was said in the heretofore cited case of *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, at p. 3, 284 Pac. 915,

"There was no other indicia of ownership than mere possession. *That was not enough.* There must have been some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell and which the real owner will not be heard to deny or question, to the prejudice of the innocent third persons dealing on the faith of such appearance." (Italics ours.)

The maxim "*Caveat emptor, qui ignorare non debuit quod jus alienum emit*" goes back to the days of the Roman law. For ready reference, its translation is:

"Let a purchaser beware, who ought not to be ignorant that he is purchasing the rights of another.

Let a buyer beware; for he ought not to be ignorant of what they are when he buys the rights of another.” (14 C. J. S., p. 57.)

A custom and usage has been invoked by the Court to vary the terms of the written agreements; to pass title on the basis of bad checks, and to protect the processors who took no pains whatsoever to ascertain that their vendors had title. If the hucksters had been outright thieves, who had actually stolen the property, the processors could not be heard to assert any claims whatsoever of title to the birds. Just where thieving ends and passing bad checks begins we do not know. The usage and custom doctrine is, we submit, insufficient in this case.

In *Leonhart v. California Wine Association*, 5 Cal. App. 19, 89 Pac. 847, the Court, citing *Withers v. Moore*, 140 Cal. 591, 74 Pac. 159, states as follows:

“ . . . ‘The contract as made by the cablegrams and explained in the letter is not uncertain with respect to that point in question. It is a positive agreement by the defendant to buy the coal in question of the plaintiff at the price of twenty-four shillings and three pence per ton, to be delivered to him free of any expense of freight, insurance, exchange or duty, all of which were to be paid by the plaintiff. To attach to this contract the custom of San Francisco, the effect of which would be that if the cargo was not received until after July 1st, 1894, the defendant would pay thirty-five cents less per ton than the price agreed upon, would be to vary the terms of a written contract by parol evidence. The Code provides that evidence may be given of “usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except

as an instrument of interpretation.” (Code Civ. Proc., sec. 1870, subd. 12.) And in accordance with this principle it has been held that it is not competent to vary a written contract by parol proof of a custom where the contract is certain in its terms. (*Holloway v. McNear*, 81 Cal. 156 [22 Pac. 514]; *Milwaukee Co. v. Palatine Co.*, 128 Cal. 74 [60 Pac. 518]; *Ah Tong v. Earl Fruit Co.*, 112 Cal. 681 [45 Pac. 7]; *Burns v. Sennett*, 99 Cal. 363 [33 Pac. 916]).’ ”

The same doctrine is set forth in *Hale Bros. v. Milliken*, 5 Cal. App. 344 at p. 366, 90 Pac. 365, where it is stated:

“ . . . It appears to be the settled rule in this state, and ought to be, that where the contract is certain in its terms, parol proof of a usage is inadmissible.”

Conclusion.

Both judgments of the Lower Court, we respectfully urge and submit, should be reversed, and with new Findings of Fact based upon the uncontroverted evidence one new Judgment should be ordered entered in favor of the plaintiff and against all the defendants for the reasonable value of the property converted.

MAURY, LARSEN & HUNT,

By GEORGE R. MAURY,

Attorneys for Appellant.

14471
No. 14690-C.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and
CHARLEY GEERS,

Appellees.

REPLY BRIEF OF APPELLEES W. E. McKIB-
BEN, A. B. CARTER, AND O. R. LEWIS.

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FILED

JAN 28 1955

PAUL P. O'BRIEN,
CLERK

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REPLY BRIEF OF APPELLEES W. E. McKIB- BEN, A. B. CARTER, AND O. R. LEWIS.

Frank C. Nimocks of 11017 S. New Street, Downey, California, and Harry B. Ellison, of 11022 S. La Reina Avenue, Downey, California, appearing for Appellees W. E. McKibben, and A. B. Carter doing business as Downey Rabbit and Poultry Co., hereinafter referred to as Downey Co., and O. R. Lewis individually, Appellees.

The Pleadings.

The complaint on file is predicated on conversion of certain turkeys by the Appellees, and Appellee Charley Geers and prays judgment in the sum of \$10,400.00, together with costs, etc. The complaint does not make certain growers who were under contract with the Quaker Oats Co. a party or parties to the action.

The answer of Lewis and the Downey Co. denies conversion and sets up as a defense that the turkeys were purchased by it in the usual course of business and without actual knowledge of the existence of a chattel mortgage upon said turkeys between or among the Quaker Oats Co., and the said growers.

The Issues Involved.

The issues involved in this action are:

1. Did the Downey Co. and Lewis knowingly convert the turkeys to their use?
2. Did the Downey Co. and Lewis purchase the turkeys from the defendants John J. Couch and Charley Geers in the ordinary course of trade?
3. Was there a waiver and extinguishment of the mortgage lien?

Brief Résumé of the Evidence.

The facts and the law upon which the court rendered judgment is clearly set forth in the Court's Memorandum of Opinion [Clk. Tr. 21] as follows:

Memorandum of Opinion [Tr. p. 21.]

"In the above action plaintiff filed a complaint, alleging defendants wrongfully converted to their own use 1500 live turkeys each of which was the subject of a chattel mortgage and upon which the plaintiff had a lien.

Harry McVickers and Carl W. Ohlson are turkey growers near Hemet, Riverside County, California. Plaintiff is in the business of providing poults for turkey growers and furnishing feed for the turkeys until maturity. As a protection for the money advanced for poults and

feed to be furnished, chattel mortgages are executed covering the turkeys. In this particular case poultz were furnished to McVickers and Ohlson and, subsequently, feed was furnished by plaintiff. (21) A chattel mortgage was obtained from each of the turkey growers, which was duly acknowledged and recorded in Riverside County, California. At the time of the execution of the chattel mortgage, an additional contract was entered into between the parties by which McVickers and Ohlson agreed not to sell any of the turkeys without first having obtained the plaintiff's written consent. It does not appear that this contract was ever recorded. In due course of time the poultz grew to maturity and were ready for sale.

Defendants John J. Couch and Charley Geers were hucksters. They were in the business of buying turkeys from growers, transporting the turkeys to the market in Los Angeles, California, and selling them to processors. The processors, in turn, would slaughter the turkeys and sell either to wholesalers or retailers for ultimate consumption by the general public.

Defendant Couch appeared at the ranches of Harry McVickers and Carl W. Ohlson and purchased the turkeys involved in this proceeding. Most of the purchases were made by the defendant Couch. The turkeys were paid for by checks, made payable to the growers and to the Quaker Oats Company. The turkeys were transported from Riverside County to Los Angeles where they were sold to the defendant processors. All of the checks given in payment for the turkeys involved herein were turned down by the bank, for the reason that there were not sufficient funds in the account to pay the checks when presented. However, checks given for the first purchase

of turkeys from grower McVickers were subsequently deposited and actually cleared. None of the other checks were ever paid.

Evidence in the case disclosed that the business (22) of collecting from the processors and the deposit of the money in the bank was delegated to Geers; defendant Couch's main duty being to contact the farmers, buy the turkeys and transport them to Los Angeles where they were turned over to Geers for sale. Evidence introduced at the trial indicated that at the time the defendant Couch gave checks for the purchase of these turkeys there was sufficient money in bank to cover the checks; but by the time the checks were presented to the bank for payment the account had been depleted to such extent that the checks were turned down by the bank.

Plaintiff contends that it had a valid chattel mortgage on the turkeys herein; that the chattel mortgage was good at the time of sale, and inasmuch as it was never paid for the turkeys plaintiff could maintain this action against the defendant Couch and the processors upon the theory that the turkeys had been unlawfully converted. Prior to the commencement of this action *Geers* was killed in an automobile accident and in consequence was not named as a party defendant.

All parties concede the chattel mortgages were valid. Defendants contend, however, that plaintiff lost its lien upon the turkeys at the time of sale, because the turkeys were sold with the consent of the plaintiff mortgage holder.

Evidence in the case discloses it was the custom of plaintiff to allow its growers to sell their turkeys, the only requirement insisted upon by plaintiff being that if checks were given in the sales, they would be made payable to the

grower and to the Quaker Oaks Company jointly. Otherwise, the company did not seem to have any control over sale of the turkeys.

However, plaintiff contends the contracts executed (23) between it and the growers provide the turkeys could not be sold without written consent to the sale having first been obtained from the mortgage holder. There is no dispute that such a contract was entered into; but the evidence conclusively shows the provision of the contract relative to obtaining written consent from the mortgage holder before turkeys were sold was waived by the conduct of the Quaker Oats Company. Although plaintiff is engaged in selling feed to numerous turkey growers, in no instance was there any evidence that plaintiff ever complained because of any grower's sale of turkeys without first having obtained the written consent to plaintiff.

Grower Ohlson testified that some time prior to sale of the first lot of turkeys to Couch he had sold a small lot of turkeys (75 or 80 birds) to a small operator; that he did not have written consent from the Quaker Oats Company to sell the birds; that the check in payment was made to himself and the Quaker Oats Company; that he sent the check to the Quaker Oats Company, which was accepted, and that the plaintiff herein at no time protested that the birds could not be sold without its written consent. He testified he had been dealing with plaintiff for two years and had always sold the turkeys he raised without any written authorization of sale from plaintiff. He sold his turkeys to purchasers who solicited the sales, and the checks made payable to him and the Quaker Oats Company were sent to the Quaker Oats Company. At no time did the Quaker Oats Company

complain that turkey sales were made without obtaining its written consent, nor did the plaintiff at any time protest such procedure.

In the case at bar the first lot of turkeys was purchased from grower McVickers. Checks were obtained by (24) McVickers from the defendant Couch, in payment of the first lot of turkeys, which checks were made payable to McVickers and the Quaker Oats Company. The checks were thereupon sent by McVickers to the Quaker Oats Company, and the Quaker Oats Company did not protest in any way, nor did it even suggest to McVickers that he did not have a right to sell the turkeys without first obtaining its written consent. Instead, the checks were accepted by the Quaker Oats Company and deposited in the regular course of business. They were returned by the bank and subsequently were redeposited by the Quaker Oats Company and were finally honored and paid.

McVickers testified he had been raising turkeys for seven years and had been dealing with the Quaker Oats Company since prior to 1952; that he had always sold the turkeys he raised and had never had any written authorization from the Quaker Oats Company covering such turkey sales. Although some time elapsed between receipt by the Quaker Oats Company of the first checks from McVickers and subsequent sales by McVickers and Ohlson, the plaintiff did not in any way impress upon growers McVickers and Ohlson that they could not sell the turkeys until plaintiff's written consent had been first obtained.

One of the defendant processors testified he had been in the turkey business for thirty-two years; that he had purchased turkeys from farmers at numerous times; that

he had never seen any written authorization from mortgage holders relative to sale of turkeys. He said that he just bought the turkeys from the farmers and made his checks payable to the farmers and the feed men; that he had never contacted a feed man; that he had purchased turkeys which were fed by the Quaker Oats Company, and that at no time did the (25) Quaker Oats Company indicate to him that the farmer could sell turkeys only upon its written authorization.

Plaintiff further contends growers had no authority to sell turkeys except for cash and that acceptance of a check, later dishonored by the bank, was not cash, and consequently there was no sale. However, the evidence conclusively shows it was the custom in the turkey industry to pay farmers by check and not by cash, and that the checks were made payable to the farmers and the feed company. At no time did the Quaker Oats Company suggest to anyone in any manner that checks were not acceptable. In fact, checks were accepted and treated as cash; and in the case at bar the checks which cleared were made payable to the grower and plaintiff and were accepted by the plaintiff, and plaintiff did not in any way indicate to the grower that such checks in payment would not be acceptable. Plaintiff also contends the mortgage which it had on the turkeys was a valid lien until paid and that there was no payment until the checks cleared.

It is defendants' contention, however, that although there was a valid mortgage, nevertheless, the mortgage lien was extinguished when plaintiff allowed the mortgagor who had possession of the turkeys to sell them; and, consequently, defendants obtained the turkeys free and clear of the mortgage lien in question.

This is no new problem in California, for from the earliest times the courts have been called upon to adjudicate disputes arising over the sale of mortgaged crops and chattels. In 1896, the Supreme Court of California, in *Maier v. Freeman*, 112 Cal. 8, was called upon to determine the rights of a purchaser of mortgaged sheep which, while in (26) possession of the mortgagor, were sold. In that case the court points out that it was part of the agreement between the parties to the mortgage that the mortgagor should sell the sheep but should deposit the net proceeds of the sale to the credit of the mortgagee. The Court quotes from *White Mountain Bank v. West*, 46 Me. 15 (Page 12 of the California citation) as follows:

‘“from the time of sale the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him.”’

The Supreme Court of California then went onto say:

‘There are many decision that the mortgagee of chattels may authorize the mortgagor to sell the encumbered property and apply the proceeds of sale upon the debt secured, and that such an agreement does not render the mortgage fraudulent in law, nor affect the lien thereof *prior to the sale* (citing cases); but we have found no case in which the lien was held to attach to the proceeds unpaid by the purchaser.’ (Emphasis supplied.)

In *Ramsey v. California Packing Corporation*, 51 Cal. App. 517, which dealt with the sale of mortgaged crops, the Court said (p. 522):

* * * Obviously, if the crops were removed by and with the consent of the plaintiff, then they

were not wrongfully or tortiously removed, and in that case the lien of the mortgage ceased upon such removal by operation of law.’ (27)

In that case (the facts of which are somewhat similar to those in the case at bar) the mortgage holder knew that certain portions of the crop had been removed from the premises and sold yet did not take any steps to prevent further removal and sale. The Court continues, at page 528:

‘* * *; for, at the time of the purchase of the tomatoes by the Packing Corporation and the corn by Powers, the lien of the mortgage had *prima facie* been extinguished by the removal of those crops from the land on which they were grown (citing cases), and it rested upon the mortgagee, if he would still enjoy the benefit of his mortgage security, to rebut that presumption by showing that the crops were removed without his knowledge and consent and that it was, therefore, a tortious removal. And, as before declared, even if it had been shown that the mortgagors had wrongfully removed the crops and sold the same to a third party, it would still be necessary, to bind the latter in an action for damages for such wrongful removal or for the conversion of the crops, further to show that such removal was tortiously effected with his knowledge or by connivance on his part with those wrongfully removing the crop to effect such removal. * * *

This agreement (allowing the mortgagors to sell the mortgaged crops and turn over the proceeds of sale to plaintiff and Emerson) amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage.’

(28)

In the *Valley Bank v. Hillside Packing Company*, 91 Cal. App. 738, the bank, after loaning money and taking a chattel mortgage upon an orange crop, authorized delivery of the crop to any packing house selected by the mortgagor. At page 741 the Court said:

‘* * * The mortgagor’s removal without consent of the mortgagee would be tortious. Consent that he may do so would extinguish the mortgage lien.’

H. B. Reno v. A. L. Boyden Company, 115 Cal. App. 697, concerned a chattel mortgage, which had been given on an apiary, honey and other personal property. A portion of the honey stored was sold after recordation of the chattel mortgage. In that case the Court found the plaintiff had given the defendant authority to sell the honey, although the plaintiff testified:

‘I told him the last time he positively couldn’t sell that honey unless he paid me \$500.00 and all interest to date.’

The Court said at page 700 that the evidence

‘clearly shows that he gave defendant Fassel permission to sell the honey on the latter’s promise to pay him out of the proceeds \$500 and the interest due, * * * Fassel having sold with plaintiff’s consent, there could be no conversion, either in the sale by him or in the purchase by his co-defendant, * * *’.

The Court thereupon ruled (p. 702) that where:

‘the property is sold with the consent of the mortgagee, * * * the latter waives his lien and the buyer is protected by the absolute sale.’ (29)

In one of the latest cases decided by the California courts, *I. S. Chapman & Co. v. Ulery*, 15 Cal. App. 2d

452, the Court, after reviewing prior decisions of the California courts relative to the effect of selling mortgaged property with consent of the mortgagee, reiterates the rule that where mortgaged property is sold with consent of the mortgagee, the mortgagee thereupon loses his lien.

In the case at bar the evidence discloses that plaintiff allowed growers to sell turkeys to anyone who would purchase them. When plaintiff permitted the growers to sell mortgaged property, the mortgagee thereupon lost its lien, and removal of the turkeys in question from the ranch of the growers was not tortious.

As a consequence, judgment will be rendered in favor of the defendants herein. Counsel for defendants will prepare findings of fact, conclusions of law and judgment in conformity with the opinion expressed herein for presentation for signature on or before the 15th day of May, 1954. Dated May 5, 1954. Harry C. Westover, District Judge."

(Obviously, the name "Geers" on page 23 should have been "Couch." (This matter is mentioned as "technical points" on p. 8 of App. Op. Br.))

Comment.

As before stated this action is based upon conversion. Conversion means the unlawful taking of one's goods or chattels. Unlawful taking incorporates a tortious act. In the case at bar, in order to support appellant's theory, this Court must hold that the sale to appellees McKibben *et al.*, was unlawful, tortious, and accomplished by unlawful and tortious acts of Appellees McKibben, Carter and Lewis.

The evidence relied upon to establish conversion falls far short of any unlawful or tortious act. The conduct of the appellant permitted the transfer of the property by the growers to the hucksters, with the knowledge that the hucksters would sell the turkeys to the processors, the only limitation being that checks from the hucksters were to be made payable to the grower and the Quaker Oats Company. Such procedure was minutely followed and is definitely established by the evidence.

The Evidence.

Mr. Geers testified in part as follows:

“The Court: I notice these checks are made out, at least some of them are made out jointly to not only the seller, but the Quaker Oats Co. Did you know when you made out these checks that the Quaker Oats Co. claimed a lien on the turkeys?”

The Witness: Yes, sir. That is how come us to get a lead on where to buy them. The Quaker Oats representative approached us at the scales in Perris, a fellow by the name of Bill Brooks, and asked us to buy these turkeys.”

The Court: In all these transactions, did you pay for any of the poultry or the turkeys in any way except by check?

The Witness: No, sir.

The Court: Never paid cash?

The Witness: No, sir.

The Court: Always gave checks?

The Witness: Yes, sir.” [Tr. 75.]

“The Court: How did you know there was a lien on the poultry?”

The Witness: Most of the growers would tell you.

The Court: Did they tell you to make the check to themselves and the feed company?

The Witness: Yes, sir." [Tr. 75, 76.]

William B. Brooks a representative of the appellant, testified in part as follows:

"Q. During the month of August 1952, by whom were you employed? A. In August 1952 I was employed by the Quaker Oats [Tr. 111-114] Company.

Q. What was your capacity there? A. I was district representative for Riverside County.

Q. Did you have under your jurisdiction the area or Perris? A. Yes, I did.

Q. Are you acquainted with Mr. McVicker and Mr. Ohlson, growers up there? A. Yes, I am." [Tr. 145.]

"The Court: You said a little while ago the growers were authorized to sell their turkeys to certain individuals.

The Witness: Yes.

The Court: Did you give that authorization to growers in writing?

The Witness: No.

The Court: Just orally?

The Witness: That's right." [Tr. 152.]

Cross-Examination by Mr. Geers:

"A. The check No. 1, Exhibit 1, was made out to C. W. Ohlson, and Exhibit No. 2 is made out to C. W. Ohlson and the [Tr. 134] Quaker Oats Company.

Q. Did you question that? A. Yes, I did. Mr. Ohlson told me that he had requested Mr. Geers to make out a check to him personally in the sum of \$600, and that he intended to request permission

from me or from the credit department of Quaker Oats Company to keep that \$600. *The requirements in our contract with the growers call for checks to be made out jointly to the grower and the Quaker Oats Company.*" [Tr. 162.]

Testimony of W. E. McKibben in part:

"A. I purchased some poultry products from John Couch and Charles Geers.

Q. Was that in the regular course of business?
A. Yes." [Tr. 166.]

"Q. Was that a fair and reasonable market price for the birds at that time, sir? A. I believe so." [Tr. 168.]

"The Court: How long had you dealt with John Couch before [Tr. 147] August 1952?

The Witness: Off and on for, I think, four years.

The Court: Do you know of your own knowledge where he purchased his turkeys during that four years period of time?

The Witness: He operated throughout Southern California.

The Court: He bought them everywhere?

The Witness: Everywhere throughout Southern California, turkeys and poultry.

The Court: Do you know that of your own knowledge?

The Witness: I know that of my own knowledge, yes." [Tr. 173.]

"Q. (By Mr. Nimocks): You said you had been dealing with John Couch for some four years, is that correct? A. I believe four years, off and on for four years.

Q. Have there been any occasions where you had difficulty with turkeys he had sold you before? A. None whatsoever." [Tr. 175.]

"Q. (By Mr. Nimocks): Have you or your concern personally dealt with growers in regard to mortgaged turkeys? A. We have.

Q. As to Quaker Oats? A. We have.

Q. Was that before this time? (151) A. Before this time.

Q. Have you done it since this time? A. Since this time.

Q. Did anybody from Quaker Oats notify you, give you written consent to purchase those turkeys? A. We have never had written consent to buy any turkeys since I have been in business, never." [Tr. 176, 177.]

"The Witness: We will take John Couch as an example. He is the buyer of the commodity. So it has been the practice in the trade that whoever bought it should make the check payable jointly to the milling company and to the grower, and you usually would ask the grower, 'Are these turkeys chattel mortgaged?' If he refused to answer, you don't buy them, or you take time to check and see who holds the chattel. The buyer who buys the commodity at that time, the responsibility will usually lay in the hands of the buyer.

Our contacts with the grower would be similar. If we were to make first purchase of the turkeys, we would have responsibility of seeing that the feed company is paid.

The Court: What do you know about the right or the permisison given the grower to sell the turkeys?

The Witness: It has always been verbal. The field representative, such as this man that testified yesterday, would contact me as the processor, or Mr. Couch or any of the haulers (155) that buy live-stock in the country, operate trucks in the country, tell them here is a particular flock of turkeys to sell, go to work on them. If you establish a satisfactory price or if that individual establishes a satisfactory price with the farmer, they would buy them and haul them to a person processing the commodity. Our business is primarily processing.

The Court: I know what your business is. The hauler goes up to a ranch to buy turkeys. What authority has the grower to sell those turkeys?

The Witness: Verbal from the field man.

The Court: Have you ever seen a written authorization?

The Witness: No, sir.

The Court: Have you ever received a written authorization?

The Witness: I have never received a written authorization, and I have bought lots of turkeys. The only instance of a written authorization was in this last year, a purchase where the commodity was not going to be paid for at the time we picked it up. You can verify this with General Mills. We were storing the commodity for the grower and they gave us directions on how the turkeys would be stored and in whose name they would be stored and retained. Other than that we have never received written authorization.

The Court: When you bought turkeys and paid for them, you never did get a written authorization from the company (156) furnishing the feed?

The Witness: No, sir, and I bought lots of Quaker Oats turkeys through another hauler.

The court: You bought Quaker Oats turkeys?

The witness: Yes, sir.

The Court: Did you receive any written authorization?

The Witness: No, sir.

The Court: Did you have any problem with any other hauler than Couch?

The Witness: I have never had any trouble with any hauler other than John Couch.

The Court: All right." [Tr. 179, 180, 181.]

Orville Robert Lewis testified in part as follows:

"Q. (By Mr. Maury): What is your occupation, Mr. Lewis? A. Retail poultry operator, store.

Q. Do you do business under the name of Thrifty Poultry Company? A. I do.

Q. And where is that? A. It is 8907 Atlantic Blvd., in the City of South Gate.

Q. That is in Los Angeles County, California? A. Right.

Q. Calling your attention to the month of August, 1952, did you purchase any turkeys from John Couch or Charley Geers? A. I did." [Tr. 199.]

"The Court: Are those the only two transactions you had with Couch?

The Witness: During the month of August or September.

The Court: Had you dealt with Couch before?

The Witness: Yes.

The Court: How long?

The Witness: Three or four years." [Tr. 205.]

Testimony of Orville Robert Lewis:

The Court: How long have you been in the turkey business?

The Witness: 32 years (184).

The Court: Has your experience in the turkey business only been in the buying and dressing and processing of turkeys?

The Witness: Well, I have done everything in the turkey business from hauling them from Texas, I mean in 32 years I have gone the complete circle, I would think.

The Court: What questions do you ask the seller of turkeys as to whether or not they are mortgaged, there is a lien?

The witness: When we buy from a farmer a flock of any size—smaller flocks we know are not mortgaged, but the larger flocks, if we know the farmer, we ask him and take his word for the fact, whether they are mortgaged or not. If we don't know the farmer, we don't usually buy them.

The Court: The truckers, what do you do about the truckers?

The Witness: We buy the stuff without question.

The Court: Without any inquiry at all?

The Witness: That is the general procedure, unless we are suspicious of the man.

The Court: Are you familiar with the custom in Southern California relating to the sale of poults and sale of feed to the farmers?

The Witness: Right.

The Court: What is that custom? (185)

The Witness: I would say 90 per cent of the large flocks are owned by feed companies.

The Court: Are owned by the feed companies?

The Witness: I mean through the mortgage.

The Court: You mean through the mortgaging to the feed company? They are mortgaged to the feed company?

The Witness: Right.

The Court: Have you ever been given a written authorization to buy any turkeys from a feed company?

The Witness: It is a practice that does not exist. It is asked for, but never has been carried out.

The Court: Who has the authority to sell turkeys?

The Witness: Customarily the man that raises them is the one that sells them. I never bought anything from a feed company direct unless it was a foreclosure, of which I have had a lot. I mean they would foreclose on the mortgage.

The Court: When you go out to buy turkeys from a farmer, do you ask to see any written authorization to sell the turkeys?

The Witness: I never, and I bought lots.

The Court: You just buy them from the farmer.

The Witness: Just buy them from the farmer and make the check to the feed company and the farmer and go on.

The Court: That has been your experience?

The Witness: That has been the procedure for the last 30 (186) years.

The Court: All right.

Q. (By Mr. Maury): Do your checks bounce?

A. Do my checks bounce?

Q. Yes, sir. A. I have a statement I can bring up here for \$11,000 overdraft on my bank statement. I wouldn't think I would have much over that.

Q. The bank will meet your checks? They can give up to \$15,000 on overdraft.

Q. Your credit is good? A. My credit is good. I have had checks bounce.

Q. But not for not sufficient funds. A. Yes, but years ago. 32 years is a long time.

Q. Let's say in the last five years." [Tr. pp. 206, 208.]

"Q. Do you know how many dollars worth of turkeys produced in the Southern California area annually? A. No, I could look at my files; but there are millions of dollars worth.

Q. Do you know of any custom or usage in the trade, the turkey industry, that checks are accepted as payment whether or not they are good checks? A. Well, it is customary when I give the farmers a check payable to the feed company and the farmer for him to in turn turn that over to the feed company as a payment on his bill, which naturally he is given the same form of credit on it as in a bank deposit. They wait until the check has cleared, I mean they don't take a check as currency anyhow whether it is in the feed business or anywhere else. I mean the check has to be good." [Tr. 209.]

Mr. Lewis after testifying to his experience as a Huckster having been in that business for 32 years, testified further as follows:

"The Court: Did you buy turkeys or did some of your employees buy turkeys from the farmers in 1952?" [Tr. 210.]

"The Witness: Yes, sir.

The Court: When you went up to a farmer to buy turkeys, who sold the turkeys?

The Witness: The farmer.

The Court: Did you ever see any written authorization that he could sell turkeys?

The Witness: I never even contacted a feed man.

The Court: You never contacted a feed man?

The Witness: I just bought the turkeys from the farmer and made the checks payable by the hundreds to the farmer and the feed man. I never contact the feed man.

The Court: Supposing the farmer doesn't tell you the turkeys are mortgaged to a feed company?

The Witness: Make out the check to the farmer, if you know the farmer.

The Court: If you know the farmer?

The Witness: Yes, I mean I would have no reason to (190) doubt the farmer I have known for six years. There is one man I buy from all the time and he buys from a feed company, I presume. He pays his bills.

The Court: Have you bought from any farmers financed by Quaker Oats Company.

The Witness: Yes.

The Court: And you bought from the farmer?

The Witness: Directly from the farmer.

The Court: Did the Quaker Oats Company ever tell you you couldn't buy direct from the farmer?

The Witness: No.

The Court: Did Quaker Oats Company ever tell you you had to have written authorization to buy?

The Witness: No. I bought Quaker Oats feed but I never had any other dealings with them. My checks will say 'Quaker Oats Company,' that's all. A check that is made for poultry is to some farmer and Quaker Oats Company, or some farmer and

Purina Feed Company, or some farmer and some other company.

The Court: I have no further questions." [Tr. 211, 212.]

We submit that the evidence is ample, without conflict and supports the statement in the trial courts opinion and findings of fact to the effect that title to the turkeys in question was transferred when delivery was made by the growers and the checks were made payable to the grower and the appellant and that the transactions were treated as cash all of which amounted to a waiver and extinguishment of the mortgage lien, and that the appellant by its own actions is estopped from denying transfer of the turkeys.

Mr. Harry McVickers, one of the growers, after testifying to his relationship with the huxters, testified in part as follows:

The Court: May I ask a question?

Mr. Maury: Certainly.

The Court: How long have you been raising turkeys?

The Witness: Seven years.

The Witness: Seven years.

The Court: Have you dealt with Quaker Oats before 1952?

The Witness: Yes, sir.

The Court: Quaker Oats has always had a mortgage on the turkeys, have they, for the turkeys and the feed?

The Witness: Yes, sir.

The Court: Every year, you have sold the turkeys as the poults would grow up and mature?

The Witness: Yes, sir.

The Court: Did you ever have any written authorization from Quaker Oats that you could sell turkeys?

The Witness: No, sir, I didn't.

The Court: You just sold them to the buyers as they came along?

The Witness: That's right.

The Court: Then you notified the Quaker Oats that they had been sold and sent the money to them?

The Witness: I did not notify them first. I sent the money first. (201)

The Court: You sent them the money?

The Witness: That's right.

The Court: As far as Geers is concerned, you just followed the custom that had been established for several years, you sold the turkeys, took the check, and sent it to Quaker Oats, is that right?

The Witness: That's right.

The Court: Just a minute. I notice Exhibit 13, which is a turkey growers agreement, supposed to have been signed by you, specifically says, 'Grower shall not sell, encumber, or otherwise dispose of said turkeys without the prior written consent of Quaker.'

The Witness: Yes, sir. Well, it isn't strictly enforced that way. I don't know how to explain it.

The Court: But you never did get a written consent?

The Witness: No, sir, I did not.

The Court: And you sold your turkeys from year to year?

The Witness: That's right.

The Court: And Quaker never objected up to this particular time to your selling the turkeys?

The Witness: That's right." [Tr. 219, 220, 221.]

"Q. (By Mr. Geers): Did you have any discussion with Quaker Oats or any representative or agent of theirs regarding the sale of your turkeys to John Couch or myself? A. Yes. I sold the first load to you and then Brooks came along and said, 'Get your checks in to the Quaker Oats.' That's all that was said.

Q. Your checks were already in, though, weren't they? A. That's right.

The Court: After you sold the first load, Mr. Brooks came around to see you and he said, 'Get your checks in.' Did he mean the checks for the birds that were already sold or the (217) birds that were to be sold?

The Witness: The birds that were already sold. He says, 'Get your checks in.'" [Tr. 233.]

Mr. Carl W. Ohlson one of the growers testified in part as follows:

"The Court: May I ask this witness some questions? (226)

Mr. Maury: Surely.

The Court: How long have you been in the turkey business?

The Witness: About four years.

The Court: Have you always dealt with Quaker?

The Witness: I dealt with Quaker for the first two years and that was the second year of my dealings.

The Court: In 1952, that was your second year growing turkeys?

The Witness: Yes.

The Court: In 1951 had you grown turkeys?

The Witness: Yes.

The Court: Did you deal with Quaker?

The Witness: Yes, I did. I started with Quaker.

The Court: You said you had two other flocks?

The Witness: That's right.

The Court: Did you have those with Quaker, too?

The Witness: Yes. The whole year's operation was with Quaker Oats Company.

The Court: In 1951, how many flocks did you have?

The Witness: Two.

The Court: Who sold the flocks?

The Witness: I sold the birds.

The Court: Did you have any written authorization from Quaker that you could sell them? (227)

The Witness: I was in contact with their field man right along and their field man, who was Mr. Canan at that time, recommended Mr. Muzak, and I sold my birds to him and I had no trouble.

The Court: They didn't give you any written memorandum?

The Witness: No, they didn't give me any written memorandum.

The Court: In 1952, did you sell any birds in 1952 before you sold the birds in litigation here?

The Witness: I sold approximately 75 or 80 birds to small operator.

The Court: Did you have written consent from Quaker to sell those birds?

The Witness: No, I didn't.

The Court: Did you just sell them yourself and then you sent the money to Quaker?

The Witness: I sold them myself, and the check was made out to both of us, and I sent it to them.

The Court: Did you talk to the field representative before you sold those birds?

The Witness: Yes, I did.” [Tr. 241, 242.]

“The Witness: No, he said Quaker Oats were preparing a list of approved buyers, but I never did receive that list of approved buyers. That was after I had already sold the birds. I waited for it. He said that wasn’t on that list I should call the office and make sure the operator was trustworthy.

The Court: You didn’t have any experience in raising turkeys except these two years, is that right?

The Witness: That’s right.” [Tr. 243.]

POINTS AND AUTHORITIES IN SUPPORT OF FINDINGS AND JUDGMENT.

Without restating the points and authorities cited by the trial court [Clk. Tr. 27, 28, 29, 30], appellees incorporate the same and respectfully contend that these authorities definitely uphold the conclusion reached by the trial court, which is simply to the effect that the plaintiffs permitted the growers to sell the mortgaged property and that thereupon the Quaker Oats Company lost its lien and that the removal of the turkeys and delivery to the appellees was not tortious, was accepted by appellees McKibben, Carter *et al.*, in the ordinary course of business and free from the mortgage lien.

The Law Applicable.

Appellees understand the law to be that the recordation of the chattel mortgage of one county of this state is "constructive" notice to the world.

See:

Hammels v. Sentous, 151 Cal. 231.

As before stated however, a factor is added in that the practice of plaintiff and other mortgagees in this field allowed mortgagors to dispose of the mortgaged chattels provided checks in payment thereof were made jointly to the mortgagee and mortgagor. It is true that mortgagor's written agreement with mortgagee provided that mortgagor must have prior written consent of mortgagee to sell; there is no evidence that that agreement was recorded so as to give constructive notice to prospective purchasers of that requirement nor is there any evidence at all to show that mortgagee required compliance with that provision. On the contrary, appellant

has made it a practice to either give oral assent or to allow the mortgagor to sell without any prior consent, either oral or written. The appellants contention herein would allow it to reap all the benefits of the practices they have indulged without taking any of the risks involved in allowing such a practice and not requiring strict compliance with their written contract.

It appears to be well settled that the general rule in the United States is embodied in 97 A. L. R. 646 which states as follows:

“The rule is well established that the consent of a chattel mortgagee that his mortgagor sell the mortgaged property and receive the proceeds, when acted upon, constitutes as to the purchaser, a waiver of the lien of the mortgage.”

California has followed that rule on numerous occasions, as early as 1896 and as recently as 1936.

See:

Maier v. Freeman, 112 Cal. 8 (Cited in Court's opinion);

McIntyre v. Hauser, 131 Cal. 11;

Ramsey v. Calif. Packing Corp., 51 Cal. App. 517 (cited in Court's opinion);

Valley Bank v. Hillside Packing Co., 91 Cal. App. 738 (Cited in Court's opinion);

Reno v. Boyden Co., 115 Cal. App. 697 (Cited in Court's opinion);

Kuehn v. Don Carlos, 5 Cal. App. 2d 25;

Chapman & Co. v. Ulery, 15 Cal. App. 2d 452 (Cited in Court's opinion);

In *Maier v. Freeman*, cited above, there was a mortgage of sheep; there was also an agreement in writing that mortgagor could sell the mortgaged chattels but would deposit sales money to mortgagee's account in the bank. The Court held that the lien upon the sheep is lost and extinguished by the sale.

In *Ramsey v. California Packing Corporation*, cited above, at page 529, the Court said that an agreement allowing mortgagors to sell mortgaged crops and turn over the proceeds of the sale to the mortgagee amounts, in practical effect, to a substitution of the personal obligation of the mortgagors for the security of the mortgage.

Applying the rules cited above to the instant case, it would appear that appellants indulgence in the practice of allowing mortgagor to sell said chattels constitutes as to these Appellees who were purchasers in good faith and for value, a waiver and extinguishment of the lien of the mortgage.

"A chattel mortgagee may waive his mortgage lien or be *estopped to enforce it* by conduct inconsistent with its existence, and *consent to sell under said circumstances may constitute a waiver.*"

Kuehn v. Don Carlos, 5 Cal. App. 2d 25, 41 P. 2d 585;

McKinney, Cal. Digest, Mortgages, Sec. 62, p. 963.

Errors Specified by Appellant.

Appellant's under Specifications of Error, pages 3 to 7 inclusive of its opening brief cite nineteen separate specifications.

These specifications may all be epitomized and find their answer to the question of whether there has been extinguishment of the mortgage lien by reason of the acts of the appellant as borne out by the evidence upon which the affirmative answer to the question of the trial court is based.

Appellant, page 16 of its opening brief, criticizes the statement of the court, which is as follows:

"It is true that, although the transaction involved herein were carried on by payment by check, all parties treated the same as cash transactions."

Although it would seem that this statement is *obiter dicta* to the court's conclusion, the testimony of the representative of appellant Mr. Brooks hereinbefore quoted fully answers this question wherein he stated in part as follows:

"the requirements of our contract with the Growers call for checks to be made out jointly to the Grower and the Quaker Oats Company—" [Tr. 162.]

Answering Points Raised by Appellant.

Appellees have no argument to submit against the elemental rules of law regarding preparation and recording of chattel mortgages. Even though these appellees were in no way a party to the chattel mortgages, we understand the elemental rule to be that the mortgage itself follows the security for which it is given. This does not mean, however, that such lien for security may not be ex-

tinguished by acts of the mortgagee. This all-important point seems to have no understanding on the part of appellant and is charmingly disregarded by appellant by printing matters foreign to the trial court's findings and judgment. As an example, under Specifications of Error (App. Op. Br. p. 3), appellant contends that the trial court made inconsistent findings of fact and conclusions of law. Submitting this matter without argument, it is difficult to see wherein inconsistent findings and judgment (if in fact there is an inconsistency), has injured or damaged appellant. The reasoning of the trial court is fully set forth in the Memorandum of Opinion [Clk. Tr. 21] and the findings and judgment consistently follow the court's reasoning.

Appellant contends (Op. Br. p. 16) that bad checks are not payment and confine the greater part of its contentions to that point. We may of course concede that the elemental rule is that a bad check *tortiously given* may not constitute payment. However, that elemental rule is entirely outside the issue here, particularly for the reason that appellees McKibben, Carter and Lewis did not give bad checks, nor is there anything in the evidence which could possibly establish that it was necessary for appellant to receive money on the checks before title could pass.

On page 16 *et seq.* of appellant's brief under heading "Bad checks are not payment" appellant cites various elemental rules in support of its contention. We have no brief with the elemental rule but from an examination of authorities cited by appellant it is quite apparent that appellant fails to distinguish between an unlawful and tortious act and conduct constituting estoppel and acts done by and with the consent of the appellant in the ordinary course and conduct of business.

The case of *Clark v. Hamilton*, 209 Cal. 1, cited on page 17 of appellant's brief, involves the fraudulent giving of a worthless check in payment for a diamond. The fraudulent giving was, of course, a tortious act which element is lacking in the case at bar. Furthermore, in that case the plaintiff did not transfer possession of that ring without power to dispose of it. The evidence in the case at bar is that the plaintiff knew that the hucksters would sell the turkeys to a processor. Quoting from this case the court states:

"There must have been some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the innocent third persons dealing on the faith of such appearances.

Levi v. Booth, 58 Md. 305 (42 Am. Rep. 332)."

Therefore, the *Clark* case is no authority for the case at bar and supports appellees contention that the growers of the turkeys were clothed with apparent ownership and authority to sell. The only restriction being placed upon the grower was that the checks would be made payable jointly to the grower and the Quaker Oats Co.

Appellant cites the case of *South San Francisco Packing & Provision Co. v. Jacobson*, 183 Cal. 131, page 18 of opening brief.

This was an action in inter pleader. The money was deposited in court and the ownership to be determined between the packing company the owner, and an attaching creditor. The issue of estoppel or transactions made in the ordinary course of business were not in issue. Again Jacobson, the agent, issued a spurious check and disap-

peared. There was evidence of fraud. The court held that the appellants were entitled to the funds as against the attaching creditor, the Western Meat Co. This on the theory there was a tortious act not in the ordinary course of business, and that estoppel did not apply. The court does, however, state the rule to be as follows:

“The title will not pass until payment if by the terms of the contract such payment is a condition precedent, *or if it otherwise appears that such was the intention of the parties, unless the condition as to payment is waived.*” (35 Cyc. 322.)

It must be borne in mind that the innocent Purchaser was not made to suffer by the court's decision.

The case of *Towey v. Esser* cited in appellant's opening brief, page 35, also involves an action in interpleader. It does not involve the matter of doing business in its ordinary course, nor does it involve the matter of waiver or extinguishment of a mortgage lien. In that case, the authority to sell the live stock was to *sell only for cash*. It does not involve the agreement between the mortgagor and the mortgagee that sales may be made upon payment of checks made jointly to the mortgagor and mortgagee. The true rule is set forth in the *Towey* case as follows:

“*True, as pointed out by the court therein where the seller expressly agrees to accept a check or bill or note as absolute payment, title to the goods will pass upon delivery of the goods and the acceptance of such check or bill or note regardless of whether the paper is honored on due presentation thereof.*” (133 Cal. App. 673.)

In the case at bar the evidence is uncontradicted that the growers had the right to make a sale of the turkeys. Therefore, the general rule of the transfer of title does

not apply, particularly in view of the further fact that the sale or sales to appellees were made in the usual course of business by and with the implied consent of appellant. Therefore, the *Jacobson* case is not applicable.

Appellant cites the case of *Mitchell v. Porter*, 123 Cal. App. 329. (App. Op. Br. p. 19.) Again we have the commission of a tortious act in acquiring possession of the property, which element is entirely lacking in the case at bar.

On page 20 of the opening brief, appellant cites authorities from 70 Corpus Juris Secundum, and quotes:

“The delivery to, or acceptance by, the creditor of the debtor’s check, as distinguished from the actual payment of the check, is not absolute payment of the obligation for which the check is given *in the absence of any agreement or consent* to receive it as payment, or any laches or lack of diligence on the part of the creditor, or negotiation by the check by him.

“The delivery to, or acceptance by, the creditor of his debtor’s check, although for convenience often treated as the passage of money, is not payment, even though the check is certified before delivery, *in the absence of any agreement or consent to receive it as payment*, or any laches or want of diligence on the part of the creditor, or the negotiation of the check by him, as discussed *infra* subdivisions b-d of this section. In such case, the original debt is not paid or discharged unless, and until, the check itself is actually paid on due presentment, or, it is sometimes stated, until it is honored or accepted by the drawee; and, where the check is not paid on presentment, the creditor may treat it as a nullity, return it, and recover on the original debt, or, at his option, sue on the check.”

We have no argument with the general rule but in the case at bar *there was an agreement* amounting to consent by the appellant that checks could be received in payment for the purchase price of the turkeys. Furthermore, the case cited does not go into the matter of the ordinary course of doing business nor does it raise the matter of estoppel.

Other authorities cited by appellant have been examined and we feel it would be repetitious to cite each case in detail as they all go to the fundamental rule which is to the effect that in order to constitute conversion, there must be some tortious and unlawful act which appellant fails to distinguish between the established rule and the authorities cited and applicable to the case at bar.

If appellant's contention herein is followed, it would mean that a penalty would be placed on the right to transact business in its ordinary course. It would also completely reverse the decisions cited herein to the effect that where the mortgagee gives his consent to the mortgagor to sell the property and turn over the proceeds to the mortgagee, these facts constitute an estoppel and a waiver of the mortgaged lien.

Appellant further contends that the doctrine of *caveat emptor* applies. The elemental definition of *caveat emptor*, as we all know, is "Let the buyer beware."

It must be borne in mind that the appellees Downey Co. and Lewis took possession of the turkeys in question and paid for them in the ordinary course of business. They had no way of knowing, nor were they chargeable

with knowledge, that checks had been given by the hucksters against a bank account that did not contain sufficient funds to meet these checks. Such a contention on the part of appellant finds no support in the evidence and we submit the question without further argument.

If this contention could possibly be supported in law, then it would be the duty of every housewife when making a purchase at the grocery store, to determine whether the grocer had paid the wholesale merchant for the merchandise; and, further, whether the wholesaler had paid the jobber and manufacturer for the same, assuming that the manufacturer had a duly recorded chattel mortgage upon the merchandise. Further, if such contention is correct, if a man buys a suit of clothing from a retail merchant, upon which a manufacturer has a duly recorded chattel mortgage, it would be the duty of the purchaser to determine whether the chattel mortgagee had been paid or the lien extinguished. Obviously this is not the law. Such contention falls by its own weight.

Extending the proposal of the application of the doctrine of *caveat emptor* to the *absurdus*, it would be unsafe for a housewife to purchase a bucket of oranges or prunes at her doorstep from a Huckster without inquiring or checking official records of Orange and Santa Clara Counties for the possibility of a chattel mortgage without being subjected to an action for damages for conversion.

We submit that the doctrine of *caveat emptor* finds no solace here.

Conclusion.

We contend, and respectfully submit, that the law of this case is clearly set forth and supported in the trial court's Memorandum of Opinion to the effect that in this case there was no unlawful or tortious conversion of the turkeys; that the turkeys were purchased by the appellees McKibben, Carter and Lewis in the ordinary course of business and trade, and that the mortgage lien has been extinguished and appellant is estopped from asserting the same; that whatever rights the Quaker Oats Company may have against the makers of the checks issued against a bank account having insufficient funds or others is entirely foreign and not germane to the issues involved, insofar as these appellees are concerned.

Respectfully submitted,

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No. 14471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and CHARLEY
GEERS,

Appellees.

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

CHARLEY GEERS,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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United States Court of Appeals
FOR THE NINTH CIRCUIT

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

W. E. McKIBBEN, A. B. CARTER, O. R. LEWIS and CHARLEY
GEERS,

Appellees.

THE QUAKER OATS COMPANY, a corporation,

Appellant,

vs.

CHARLEY GEERS,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

Errata.

1. All of page 18 of Appellant's Opening Brief should be indented and enclosed in quotation marks to show that it is all an excerpt from *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, 284 Pac. 915.

2. In our citations to the Court in our Opening Brief, we neglected to include, inadvertently, the citations to the National Reporter System of the following cases, which citations are here respectfully presented:

DeBerry v. Cavalier, 113 Cal. App. 30, 297 Pac. 611;

Swan v. Smith, 102 Cal. App. 541, 283 Pac. 829;

Williams v. Braun, 14 Cal. App. 396, 112 Pac. 465;

[9th Cir., Rule 20 (2) (a)].

POINTS AND AUTHORITIES IN REPLY TO APPELLEES' BRIEF.

1. Preliminary Comment.

Appellees McKibben, Carter, and Lewis have relied entirely upon the opinion of the Trial Court and that Court's comments therein contained as controlling in the case. Every element relied on by these appellees; every authority pointed out by them, and every bit of the evidence upon which their brief is predicated, presumes that an actual payment is made for goods transferred.

That is to say; no discussion whatsoever appears in their brief upon the effect of the checks being completely dishonored. Or, in other words, nothing is urged by them to refute the proposition of law that unless the purchase price is actually paid (*i. e.*, with GOOD CHECKS or cash), the title remains in the growers and there never was an actual sale. Further, they do not refute the proposal that both under the law (*England v. Moore Equipment Co.*, 8 Fed. Supp. 532) and under the chattel mortgages [Exs. 14 and 15], when any attempted sale was made without the written consent of the plaintiff in this action, the plaintiff immediately became entitled to possession. This element was written in and recorded in the mortgages. No discussion regarding the same appears.

2. The Cases Cited by the Appellees.

On page 28 of their brief, appellees cite a list of California cases. These, but for the exception of *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69, are each and all cited by the Lower Court in its memorandum opinion. Discussion thereof follows in the order in which they appear in appellees' brief, on page 28 thereof.

In *Maier v. Freeman*, 112 Cal. 8, 284 Pac. 915, there was no question whatsoever involving bad checks. Plaintiff bought sheep from one Nellis for \$2,898.00. He owed Nellis for the sheep. Creditors of Nellis made conflicting claims upon him and he paid the money into court. The question arose as to who was entitled to the fund, a chattel mortgagee or an attaching creditor.

In the case appears the following written agreement to Nellis whereby Nellis was definitely appointed as agent to take the sheep to California to sell them and to turn the proceeds over to the bank. The writing was as follows:

“We hereby appoint William Nellis as agent to take six cars of sheep to California, one of which goes to San Bernardino and five to Los Angeles, he to turn over the proceeds of said sheep to us, to be applied upon his mortgage to us, which said mortgage covers said sheep. This applies to these six cars only, and extends for ten days only from this date, said sheep to be shipped in our name.

ARIZONA CENTRAL BANK, Mortgagees,
By J. H. Hoskins.”

The Court held, quoting *White Mountain Bank v. West*, 46 Me. 15, 20:

“ . . . from *the time of sale* the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him.” (Italic ours.)

Obviously, the Court envisioned and contemplated a good sale—not one for bad checks.

McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69, is another case in which a written consent to sale existed. Brown

owned a herd of cattle; third parties held a chattel mortgage thereon; Brown sold the cattle to the defendant by written contract, to which was appended a written statement to the effect that the cattle were mortgaged to the said third parties, naming them, to secure payment of an indebtedness owing to them by Brown. It was also pleaded that the mortgagee "approved and consented to such sale to said defendant provided the money derived therefrom was paid to them, [mortgagee] which said statement was signed by them." The Court construed the last allegation as meaning or being to the effect that the mortgagees consented to the sale, provided the money derived therefrom was paid to them by Hauser, the purchaser of the cattle. Before the purchase price was paid, the plaintiff, a judgment-creditor of Brown, garnished the money in the hands of Hauser, the defendant. Hauser, regardless of the garnishment, paid the money to the mortgagees and was sued by the judgment-creditor for the amount. The Court held that no cause of action was stated. It distinguished the case of *McIntyre v. Hauser* from *Maier v. Freman*, factually, and stated:

"There is no question in this case as to the lien of the mortgages attaching to the proceeds of the sale of the cattle."

It remarked that in *Maier v. Freeman*, the sheep had not been sold at the time the agreement between mortgagor and mortgagee was made and, in addition, in the *Maier* case the mortgagor was to receive the proceeds of the sale of the sheep. It noted that in the *McIntyre* case neither of these circumstances was present.

Ramsey v. California Packing Corp., 51 Cal. App. 517, 201 Pac. 481, in the first place, involved a *crop mortgage* as distinguished from an ordinary chattel mortgage. In

the second place, the acknowledgment of execution of the mortgage was before a person who was *one-half interested in the proceeds of the crop*. The defendants were innocent purchasers. The Court stated:

“As to actual knowledge, it is to be said that there is no evidence showing or even remotely tending to show that they had any such knowledge of the mortgage, and if, therefore, they are to be charged with any wrong in the transaction culminating in the sale of the tomatoes and corn to them, they can only thus be bound *because there must be imputed to them the notice of the mortgage constructively imparted to them by reasons of the recordation of said mortgage as required by law.*” (Italic ours.)

The Court went on to explain that no otherwise recordable instrument can be legally recorded unless its execution is legally acknowledged by the person executing it and said:

“ . . . But it is the settled law in this state as well as in other jurisdictions ‘that an acknowledgment taken before a grantee, or one standing in the position of a beneficiary under a conveyance, or other written instrument, is *void*, and does not entitle an instrument to be recorded.’ (Citing many California cases.) While, as between the parties to a mortgage so acknowledged, the mortgage is in full force and of binding efficacy, the record of the instrument does not impart any notice to third persons of the mortgagee’s right under it. (*Lee v. Murphy*, 119 Cal. 370 [51 Pac. 955].)” (Italics ours.)

In our present case, no question arises as the mortgages were duly and properly recorded [Exs. 14 and 15]. Hence the defendants, the appellees here, can find little comfort in the *Ramsey* case. Also, be it noted: No bad checks are there involved.

Valley Bank v. Hillside Packing Co., 91 Cal. App. 517, 267 Pac. 746, also involves a crop mortgage rather than an ordinary chattel mortgage. It contains no question of bad checks. The Court herein reviewed the development of the law of the chattel mortgage in California.

The contention of the appellant there was that the crop mortgage lost its vitality when the crop was removed from the premises. The Court observed the statutory distinction between a crop mortgage and an ordinary chattel mortgage, and cited Section 2972 of the California Civil Code, as follows:

“The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, *so long as the same remains on the land of the mortgagor.*” (Italics ours.)

The Court, in construing that statute, held:

“In the instant case the removal of the crop from the land constituted a *prima facie* extinguishment of the lien of the mortgage, . . .”

The Court thereafter in its opinion mentioned that there was actually a removal, and a consent to remove and that, therefore, the statute governed, and the removal extinguished the mortgage.

In *Reno v. A. L. Boyden Co.*, 115 Cal. App. 697, 2 P. 2d 214, the subject was some honey and wax covered by a chattel mortgage. Plaintiff was the owner of the chattel mortgage; the *mortgagor* had *sold* the subject of the chattel mortgage. The evidence was held to support a finding that a conditional consent to sell had been given, *i.e.*, consent to sell was given to mortgagor *if* the mortgagee should receive \$500.00.

The mortgagor sold the honey under such consent.

Again, no question of bad checks arose whatsoever.

Kuehn v. Don Carlos, 5 Cal. App. 2d 25, 41 P. 2d 585, cited by appellees McKibben, Carter and Lewis, was a claim and delivery action based upon a chattel mortgage which gave the mortgagee the right to possession upon default of the principal obligation. The mortgaged property was an airplane. The defense set up was that the mortgagee had waived the lien of his mortgage by allowing the balance of principal and interest secured by the mortgage to be included as costs, as provided by Sections 2969 and 2970 of the California Civil Code in a Justice Court action in which the airplane was levied upon by a writ of execution; and further, that the mortgagee was estopped to claim his mortgage by an agreement he had made with the judgment-creditor whereby the latter agreed to either pay the mortgagee the balance of the mortgage indebtedness or deliver to him the airplane upon payment of the amount of his judgment plus costs of sale.

The Court, in discussing the action of the mortgagee, stated:

“ . . . Admittedly, the whole procedure was irregular. The plaintiff could have stood by or he could have filed his claim with the constable. Instead, he negotiated with the judgment-creditor for the sale of the property upon execution, and in order to have the balance of the mortgage debt included as an item of costs filed with the justice a third-party claim and a receipt for payment, although *in fact he received no money.*” (Italics ours.)

The Court held that a chattel mortgagee may waive his mortgage lien or be estopped to enforce it by conduct

inconsistent with its existence. *Maier v. Freeman*, 112 Cal. 8, 44 Pac. 357 is cited. The Court finally holds:

“ . . . The conduct of the mortgagee, as disclosed by the record in this case, was so inconsistent with the continued existence of the mortgage lien that we are forced to the conclusion that the lien was waived.”

Again it is noted that there is no question of bad checks or any bad faith on the part of the *purchaser of the airplane*. The mortgagee in this case was guilty of the bad faith, an element here utterly lacking.

I. S. Chapman & Co. v. Ulery, 15 Cal. App. 2d 452, 59 P. 2d 602, is another case which deals with a *crop* mortgage, and is consequently governed under the statute pertaining thereto (Sec. 2972, Cal. Civ. Code). The mortgage in question itself provided that the mortgagor should take care of the crops and “ . . . harvest, pick, gather, and box and deliver immediately into the possession of a marketing association, packing house, or other buyer such quantity as said citrus crop as will, when sold, produce enough proceeds . . . to pay off said promissory note”

The Court held that where the crops were removed under this agreement that the mortgagor might pick and harvest the same without any restriction upon the matter of removal or the place of sale then such removal extinguished the lien as in Sec. 2972 Cal. Civ. Code provided. The case cites *Ramsey v. California Packing Co.*, 51 Cal. App. 517, 201 Pac. 481, and in passing quotes the following:

“ . . . obviously, if the crops were removed by and with the consent of the plaintiff, then they were

not wrongfully or tortiously removed and in that case the lien of the mortgage ceased upon such removal by operation of law. This proposition follows from the terms of Sec. 2972 of the Civil Code. . . . This agreement (allowing the mortgagors to sell the mortgaged crops and turn over the proceeds of sale to the plaintiff and Emerson) amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage. . . .”

Again, no bad checks were involved and obviously the price was paid in real value.

3. Argument.

Counsel for appellees McKibben, Carter and Lewis concede “that the elemental rule is that a bad check tortiously given may not constitute payment.” How a bad check can be other than *tortiously given* in the absence of a complete undeniable understanding that it is bad, and that it is definitely accepted for payment, we do not know. Tortious means wrongful. (Bouvier’s Law Dictionary, Baldwin’s Students Edition.)

The entire record is replete that Quaker knew nothing of any of these “sales” being made until after they were made, and until after the checks were in its hands. Quaker deposited the checks in the ordinary course of business.

The only conduct on Quaker’s part which might be said to approach an estoppel was the custom that checks were made to Quaker and grower jointly. But these were supposed to be *good checks*. Ohlson and McVickers have not passed title according to their own testimony in that they have been debited and credited “in and out” with the proceeds of the checks; when the proceeds failed to materialize, the debit remained [R. 241].

The record is utterly destitute of any semblance of fact or evidence to sustain a finding that there was an *agreement that bad checks would be accepted*, or that the checks themselves, good or bad, were to be in lieu of cash on presentment.

As in *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, 284 Pac. 915, the recipients of the checks followed the usual course of business.

Under the authorities cited here and in our Opening Brief, we respectfully submit that title never passed to the hucksters. Hence, they had no title to pass to the processors, and nothing but possession, tortiously acquired.

Appellees McKibben, Lewis and Carter have quoted in their brief from *Clark v. Hamilton Diamond Co.*, *supra*, but have omitted from their quotation one of its most cogent parts, *i. e.*, “There was no other indicia of ownership than mere possession. *That was not enough.*” The quotation then goes on to say (App. Br. p. 32):

“There must have been some act or conduct on the part of the real owner whereby the parties selling were clothed with apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question, to the prejudice of the innocent third persons dealing on the faith of such appearances.”

Here, Quaker, plaintiff-appellant, brings suit by virtue of its right of possession under the chattel mortgages. The true owners were Ohlson and McVickers. Just what conduct on the part of Ohlson and McVickers [or of Quaker] the appellees are pointing to in their brief, we do not see. Ohlson and McVickers grew the turkeys; they

“sold” them; the checks were no good; hence title never passed. It is to be observed, we respectfully submit that in *Clark v. Hamilton Diamond Co.*, 209 Cal. 1, 284 Pac. 915 the first sale from Clark to Harry Justice, as here, was made for a *bad check*. There the Court quotes the findings as follows:

“Plaintiff sold the ring to one Harry Justice who *‘fraudulently gave a worthless check in payment therefor.’*” (Italics ours.)

The final argument of the plaintiff on page 36 of its brief regarding a housewife making a purchase at a grocery store, etc. is set at rest by the merest consideration of California Civil Code Section 2955. There it is provided that no chattel mortgage of the stock in trade of a merchant can be made.

Consequently, that analogy is as “*absurdus*”, we submit, as the statement on page 30 of the brief to the effect that a *finding of fact* by a trial court is “*obiter dicta to the court’s conclusion.*”

4. Findings Are the Basic Decision.

In *Railroad Commission v. Maxey*, 281 U. S. 82, the Supreme Court said:

“The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court’s reasoning in its opinion did not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case.”

In the case of *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 316, the court said as follows:

“The observations made in the course of the opinion are not in any proper sense findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.

“It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with rule 52(a) of the Rules of Civil Procedure.

* * * * *

“We reverse the decree and remand the cause to the court below with instructions that, if the motion for interlocutory injunction is pressed, the parties, if they desire it, may be afforded a further hearing and any action taken by the court shall be upon findings of fact and conclusions founded upon the evidence and in accordance with rule 52 (a) of the Rules of Civil Procedure.”

The subject is also discussed in *Maher v. Hendrickson*, 188 F. 2d 700, and in discussing this, the Court holds:

“Under Rule 52 of the Federal Rules of Procedure, 28 U. S. C. A., it is the duty of the trial court to ‘find the facts specially.’ The ultimate test as to the propriety of findings is whether they are sufficiently comprehensive to provide a basis for decision and supported by the evidence. *Woods v. Oak Park Chateau Corp.*, 179 F. 2d 611; *Shapiro v. Rubens*, 166 F. 2d 659; *Life Savers Corp. v. Curtis Candy Co.*, 7th Cir., 182 F. 2d 4. They should be so explicit as to give the reviewing court a clear understanding of the basis of the trial court’s decision,

Skelly Oil Co. v. Holloway, 171 F. 2d 670, and to enable it to determine the ground upon which the trial court reached its conclusion. *Continental Illinois National Bank & Trust Co. v. Ehrhart*, 6th Cir., 127 F. 2d 341. *The rule is mandatory; it must be reasonably complied with. Smith v. Dental Products Co.*, 7th Cir., 168 F. 2d 516; *Dearborn National Gas Co. v. Consumers Petroleum Co.*, 7th Cir., 164 F. 2d 332.” (Italics ours.)

Thus the concept that a finding is “*obiter dicta*” finds no support in the law and, as mentioned [above] by the Supreme Court, “the opinion of the Court was not a substitute for the required findings.” Here, of course, we are directly attacking findings of the lower court as actually entered.

5. Discrepancies in Appellees’ Brief.

Appellees make many references to various parts of the record and quote much testimony. Much of it is either out of context or fails to support in any way the findings attacked. A clear example of this is as follows:

The quotation from the testimony of Mr. Brooks is cited by the appellees on page 30 of its brief is not found where cited to the record. The quotation instead of being on transcript page 162 is actually found on page 163. It has been quoted out of context. Obviously, it is a gratuitous statement by the witness and is diametrically opposite to the written language of Exhibit 12, which was and is the basic contract between Quaker, the mortgagee, and McVickers and Ohlson, the growers of the chattels.

6. Conclusion.

In closing, we again respectfully urge that new findings of fact based upon undisputed evidence should be entered by this Court and a new and different judgment should be ordered entered by the Trial Court.

Respectfully submitted,

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